SUPREME COURT, U. S.
JUL 30 1970
E. ROBERT SEAVER, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969-1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM &
5 WEST AMUSEMENT CO., INC.,

Appellants,

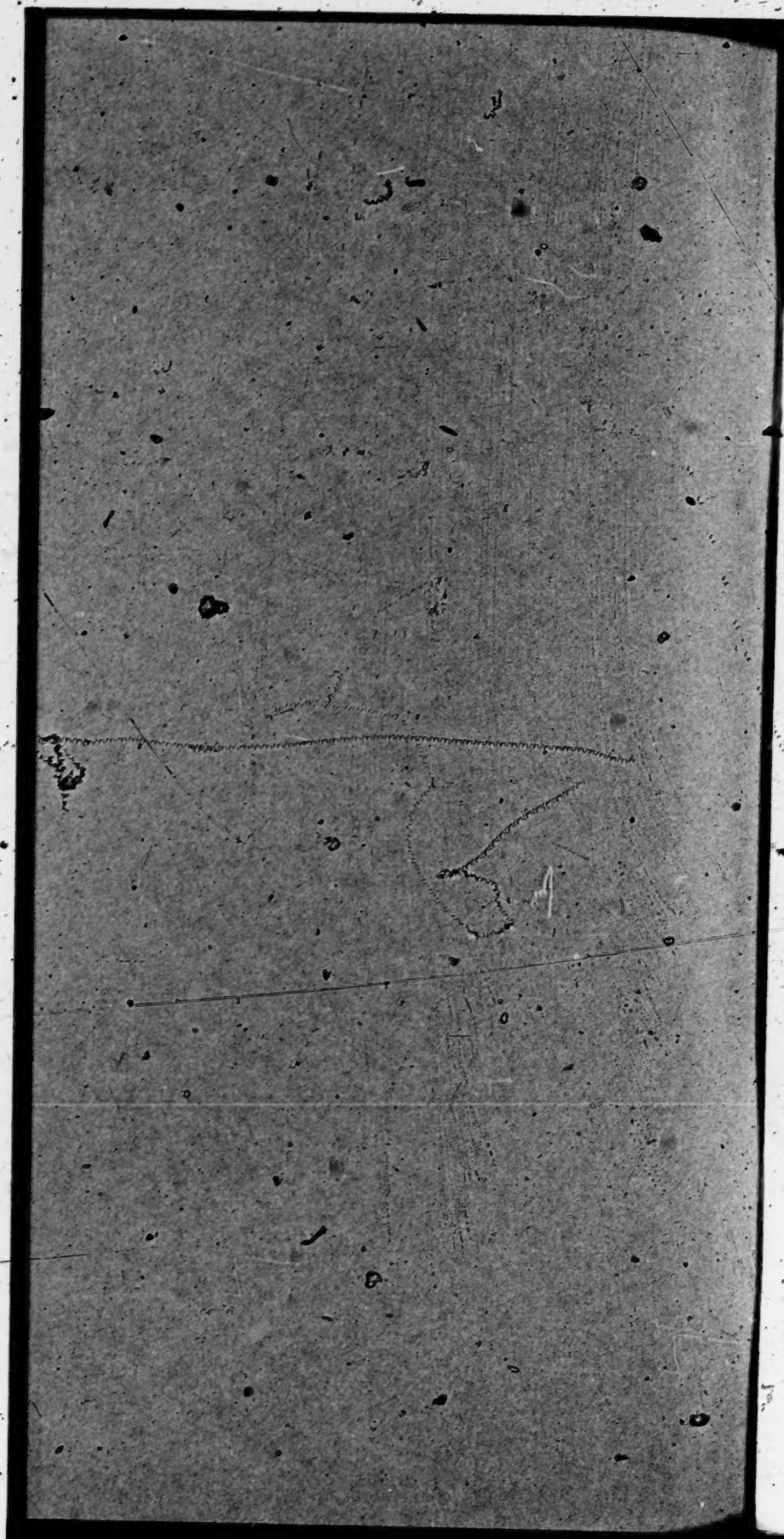
—v.—

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT FILED DECEMBER 3, 1969
PROBABLE JURISDICTION NOTED MARCH 23, 1970



Supreme Court of the United States

OCTOBER TERM, 1969

No. 905

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

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—v.—

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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APPENDIX

Docket Entries

July 11, 1969—Petition for review.

July 15, 1969—App. of Defendant by their Solrs. Arnold M. Weiner, Joseph S. Kaufman and Edward deGrazia.

July 15 1969—Motion of Defendant to shorten time for Answers to Interrogatories.

July 15, 1969—Motion of Defendant raising preliminary objection.

July 15, 1969—Memorandum in support of Motion raising preliminary objection.

July 15, 1969—Order of Court denying Motion raising preliminary objection.

July 16, 1969—Demurrer to Petition.

July 16, 1969—Motion of Defendant for taking of deposition.

July 16, 1969—Order of Court denying Motion permitting taking of Deposition.

July 16, 1969—Order of Court overruling Demurrer.

July 16, 1969—Answer of Respondents to Petition.

July 17, 1969—Summons Defendant's Witness.

July 18, 1969—Summons Defendant's Witness.

July 23, 1969—Depositions filed.

July 23, 1969—Order of Court denying Motion re interrogatories.

July 31, 1969—Memorandum Opinion of Court and Order of Court disapproving for licensing the film "I Am Curious (Yellow)".

July 31, 1969—Respondents Order for Appeal.

Appeal from the Circuit Court of Baltimore City.

Filed: August 25, 1969.

September 4, 1969—Motion to dismiss appeal filed. (Brief)

October 22, 1969—Order affirmed, appellants to pay costs.

~~August 25, 1969~~—Opinion by Finan, J., Barnes, J., concurs. Hammond, C.J., McWilliams and Singley, J.J., dissent.

October 22, 1969—Concurring opinion by Barnes, J.

October 22, 1969—Dissenting opinion by McWilliams, J., in which Hammond, C.J., and Singley, J., concur.

November 5, 1969—Notice of appeal to the Supreme Court of the United States filed.

November 5, 1969—Motion to stay issuance of mandate pending review by the Supreme Court of the United States filed.

Nov. 5, 1969—Motion for Certification and transmittal of original record to the Supreme Court of the United States.

November 10, 1969—Motion to stay issuance of mandate granted, etc.

November 10, 1969—Motion to transmit original record to Supreme Court of the United States granted.

December 3, 1969—Jurisdictional Statement filed.

December 10, 1969—Motion to extend time for filing of a motion to affirm the judgment of the Court of Appeals of Maryland.

January 10, 1970—Motion to dismiss or Affirm filed.

January 19, 1970—Appellants reply memorandum filed.

March 23, 1970—Probable jurisdiction noted and case placed on Summary Calendar.

(Title Omitted in Printing)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Howard Wagonheim, Agent, Grove Press, Inc., and 5 West Amusement Co., Inc., the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland, affirming the Order of the Circuit Court of Baltimore City, entered in this action on October 22, 1969. This appeal is taken pursuant to 28 U.S.C.A., Sec. 1257(2).

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing).

Motion To Stay Issuance of Mandate Pending Review by the Supreme Court of the United States

Howard Wagonheim, Agent, Grove Press, Inc., and 5 West Amusement Co., Inc., Appellants, by Arnold M. Weiner, Joseph S. Kaufman, Isaac M. Neuberger, Melnicove, Asch, Greenberg and Kaufman, Edward DeGrazia and Nathan Lewin, their attorneys, move, pursuant to Maryland Rule 876b, that the issuance of the mandate herein be stayed pending application for review of the judgment of this Court by the Supreme Court of the United States. The grounds of the motion are as follows:

1. Appellants intend to file a timely appeal and a petition for certiorari to the Supreme Court of the United States.

2. The appeal and petition for certiorari will present substantial federal constitutional questions, which, for the reasons heretofore argued at length before this Court, are sufficiently important and debatable as to raise a reasonable prospect that at least four members of the Supreme Court would vote to review the case.

3. The need for orderly conduct of these proceedings suggests that issuance of the mandate and execution of the judgment of this Court be stayed until the case is terminated finally.

.....

ARNOLD M. WEINER

.....

JOSEPH S. KAUFMAN

.....

ISAAC M. NEUBERGER

.....

MELINCOVE, ASCH,
GREENBERG & KAUFMAN

.....

EDWARD DEGRAZIA

.....

NATHAN LEWIN
Attorneys for Appellants

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

Order

It is this day of November, 1969

ORDERED, that the issuance of the mandate herein is stayed until January 20, 1970, and if a Jurisdictional Statement or Petition for Certiorari has then been filed by any or all of the Appellants herein, for such further time as may be necessary for the Supreme Court of the United States to act thereon, and if probable jurisdiction is noted, then further until the case has been finally disposed of by the Supreme Court of the United States.

.....

(Title Omitted in Printing)

Motion To Extend Time for the Filing of a Motion To Affirm the Judgment of the Court of Appeals of Maryland

Now comes the Maryland State Board of Censors, by Francis B. Burch, Attorney General, and Thomas N. Biddison, Jr., Assistant Attorney General, its counsel, and moves that the time for filing a motion to affirm the judgment of the Court of Appeals of Maryland in answer to the jurisdictional statement filed by Appellants be increased from thirty (30) days to sixty (60) days, for that:

1. Appellants raise five constitutional questions which they claim are substantial;

2. Your Petitioner is unable to fully answer these questions in the thirty day period provided for by Rule 16 of the Supreme Court Rules for the following reasons:

(a) The questions raised are essentially novel in character and require substantial research preparation in order to properly answer them;

(b) The court below attacked the constitutionality of the Maryland statute merely for jurisdictional purposes. The issue was neither briefed nor researched below and it requires substantial preparation in order to be properly presented;

(c) The thirty day period running from December 5, 1969, encompasses a holiday period during which time the appropriate research tools will be unavailable;

(d) Your Petitioner scheduled three lengthy judicial proceedings during this period inasmuch as your Petitioner was given no prior notice by the Appellants that they intended to file their jurisdictional statement a substantial period of time before it was due.

AND THEREFORE, Your Petitioner prays that an order be passed granting a thirty day extension within which to answer the jurisdictional statement.

.....

FRANCIS B. BURCH
Attorney General

.....

THOMAS N. BIDDISON, JR.
Assistant Attorney General
Counsel for Petitioner

(Certificate of Service Omitted in Printing)

HOWARD WAGONHEIM, AGENT; GROVE PRESS, INC.; 5 WEST AMUSEMENT CO., INC.

v.

MARYLAND STATE BOARD OF CENSORS

No. 272

Court of Appeals of Maryland

Oct. 22, 1969

The Circuit Court of Baltimore City, Joseph L. Carter, J., directed that motion picture film be disapproved for licensing as being obscene, and appeal was taken. The Court of Appeals, Finan, J., held that movie which had dominant theme when taken as whole appealing to prurient interest in sex and which was patently offensive in affronting contemporary community standards relating to description or representation of sexual matters and which was utterly without redeeming social value would be disapproved for licensing as being obscene.

Order affirmed.

Hammond, C. J., McWilliams and Singley, JJ., dissented.

Arnold M. Weiner (Joseph S. Kaufman, Isaac M. Nenberger, Melnicove, Asch, Greenberg & Kaufman, Baltimore, and Edward deGrazia, Washington, D. C., on the brief), for appellants.

Francis B. Burch, Atty. Gen., and Thomas N. Biddison, Jr., Asst. Atty. Gen. Baltimore, for appellee.

Before Hammond, C. J., and Marbury, Barnes, McWilliams, Finan, Singley and Smith, JJ.

Finan, Judge.

This is an appeal from an order of the Circuit Court of Baltimore City (Carter, J.) directing that the motion picture film entitled, "I Am Curious (Yellow)" be disapproved for licensing as being in violation of the provisions of Code (1957), Art. 66A, § 6, in that the film "meets the tests of obscenity previously laid down by the Courts * * *."[1]

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[1] On July 11, 1969, the Maryland State Board of Censors filed a petition pursuant to Section 19 of Article 66A of the Annotated Code of Maryland (1967 Replacement Volume) for judicial determination as to whether a certain motion picture, titled "I Am Curious (Yellow)" "is entitled to be exhibited within the State of Maryland considering the provisions of Section 6 of Article 66A of the said Code. This film was submitted to the Board for examination and licensing on July 1, 1969, by the applicant, Howard Wagonheim and Grove Press, Inc., "manufacturer." The Board viewed the film on July 8, 1969, disapproved it under the provisions of Section 6 of Article 66A of the Code. The Order of disapproval read as follows:

> "After reviewing the entire film, and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex; that it deals purposely and effectively with sex in a manner which appeals to the prurient interest, that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive."

The lower court viewed the film and listened to the testimony of witnesses for approximately two weeks and reviewed the film a

The primary issue before this Court is whether this film is protected matter under the First Amendment of the United States Constitution. We think not and accordingly affirm the action of the lower court.

This film was produced by Sandrew, a Swedish studio, and was directed by Vilgot Sjornan, a protégé of Ingmar Bergman.[2] Its producers would claim that it represents a kaleidoscopic portrait of Sweden, portraying problems and trends on the contemporary social and political scene. An effort has been made to develop the film along two story lines which strive to merge toward the end of the film, but never quite make it. The total effect is that the whole presents more of a framework than a plot.[2] The film was the subject of a decision by the United States Court of Appeals for the Second Circuit in *United States* v. *A Mo-*

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second time prior to rendering its opinion: The film was viewed by this Court as required by Art. 66A, § 19(a) on September 8, 1969, prior to hearing argument by counsel representing the appellants, Howard Wagonheim, Agent; Grove Press, Inc.; 5 West Amusement Co., Inc., and the appellee, Maryland State Board of Censors.

[2] The main characters in the film are "Lena," a young drama student, "Borje," a young actor, and "Vilgot," the director. The three are making a film together. In making the film Lena, having become interested in Borje, finally leaves the director, to whose apartment she has ready access, to take up with Borje. In the meantime the film gradually reveals her life as a young girl who lives with her frustrated father in a picture frame shop. Lena is disillusioned with her father, who in his idealistic youth went to fight in the civil war in Spain and who became frightened and fled. Lena endeavors to convey the impression that she is carrying on the protest which her father gave up and much of the film shows her scurrying about Sweden interviewing people about political and ethical attitudes. She pickets and protests some of the political and social situations, seeks sexual freedom of a sort enjoyed by men, and in one sequence rebels violently against Borje, who conceals from her his love life with other women. In a dream fantasy she shoots him and then castrates him. All of this is put together in collage form.

Vion Picture Film Entitled "I Am Curious—Yellow," 404 F.2nd 196 (1968). The court in a two to one decision found it to be constitutionally protected. Judge Hays, in writing the majority opinion, made the apt comment that: "As with many other contemporary artistic productions there can be a difference of opinion as to what the picture is 'about'." *Id.* at 198. Various critics and experts who have written and testified concerning the film characterize it as a quest for identity with reality, on the part of the young heroine, amidst the shifting sands of social, moral, political, economic, and cultural transition. Her search for identity has been billed as representative of the younger generation in Sweden, their hope for a classless society, their adherence to non-violence, and their demonstrable hostility against the Franco-type totalitarian state.

The film in reaching for its social message employs the "man on the street" interview format, with Lena accosting persons from all walks of life, questioning them about their social and political beliefs. However, when the viewer ultimately realizes that the sexual scenes have little or nothing to do with what was developed by the "cinema verité" technique, not only do the sexual sequences appear artificially interjected into the film, but in retrospect the many interviews seem a contrived ruse to give the movie social value. As one of the expert witnesses called by the State, Dr. Paul Yaffe, tersely put it "Basically you have two themes running parallel, one never touching the other. Basically, one is this phony setting of class values and class structures and class problems. The other is the sexual activity of an episodic nature."

The matter of the plot was also the subject of comment by Chief Judge Lumbard in his dissent in the Second Circuit opinion wherein he stated: "The sexual aspect of the film does not arise from the plot, *as that is nonexistent* (emphasis supplied); it arises from the decision

by the director, Vilgot Sjorman, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public." *Id.* at 203.

There are several brief interviews with the late Dr. Martin Luther King, wherein he comments on his non-violent methods, and with the Russian poet Yevgeny Yevtushenko. However, these appear to be part of a facade for the main objective of the picture, namely to purvey shocking and titillating sexual sequences. As Judge Friendly stated in his concurring opinion in the Second Circuit "* * *a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms." *Id.* at 201.

Again, quoting from Judge Hays in the Second Circuit opinion:

> "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts." *Id.* at 198.

Actually, the film vividly depicts six different acts of sexual intercourse in various positions and locales. Among the more unusual scenes is an episode of copulation in the crook of a tree; a second occurs on the balustrade of the royal palace in Stockholm in rhythm to the Swedish national anthem, while a distraught sentry endeavors to stand at attention as he views the efforts of the two out of the corner of his eye. This is considered one of the humorous episodes of the film. There are a number of scenes depicting complete nudity of the male and female leads, including numerous views of both the female and male geni-

tals. There are representations of fellatio and cunnilingus, as well as the suggestion of sodomy in one of the intercourse scenes, and of castration in the fantasy scene.

The dialogue is entirely in Swedish with English subtitles. The English translation of the Swedish dialogue, as contained in the scenario which was filed as an exhibit, reveals that the translation in many instances goes beyond that contained in the English subtitles from the standpoint of use of lascivious expression.[3]

[3] The Attorney General in his brief for the appellee lists the following instances of uncommon sex in the movie:

(1) Lena's singing "In Rio de Janeiro you can fuck for free"; (2) the display of erotic Indian sculpture depicting a man with his hand on a woman's vagina; (3) the discussion between Lena and another girl about different methods of masturbation; (4) Lena's dialogue, "Are you that fucking stupid?"; (5) detailed lovemaking scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Borje caressing the girl's breasts with his tongue; (6) scene depicting sexual intercourse between Borje and Lena on the palace balustrade in which, although the parties are clothed, the act of intercourse is vividly displayed; (8) scenes of nudity at the retreat and scene depicting Lena looking at a sexual manual showing various unusual positions for sexual intercourse; (9) scene at the retreat showing Borje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena kissing Borje's penis as he caresses her vagina; (10) a discussion regarding sex which "makes them both horny"; (11) scene depicting intercourse in the water; (12) scene depicting sexual intercourse in a tree between Lena and Borje; (13 scene showing fully the naked bodies of the two lying on the floor engaged in either sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation; (14) followed by a scene fully showing Borje's genitals, followed by a scene in which the nude Borje chases the nude Lena from one room to another, throws her to the floor and mounts her in a position of sexual

In fairness to the film it should be stated that there are times when the love scenes are introduced with some grace and a discussion of them in an opinion might tend to represent them too crudely out of context. However, the overriding theme is sex per se, although perhaps not presented with the abruptness as might appear from the written word.

This Court in *Hewitt* v. *Maryland State Board of Censors*, 245 Md. 179, 254 A.2d 203 (1969), a case in which the film "Odd Tastes" was disapproved for licensing, had occasion to again set forth the legal test for obscene films. Judge Barnes writing the opinion for the Court stated:

> "Our definition of obscenity—the *Roth-Alberts* test—was restated with somewhat different emphasis perhaps, by the Supreme Court in *A Book Named 'John Cleland's Memoirs of A Woman of Pleasure' v. Attorney General*, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1, 5-6 (1966), hereinafter referred to as *Memoirs*, in which Mr. Justice Brennan, for the Supreme Court stated:
>
> "We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a

intercourse. They then are shown with loins entangled, copulating on the floor; (15) fantasy scene in which Lena shoots Borje and castrates him with a knife; (16) Lena's dialogue: "He's a big fucking shit and I'll kill him when I get hold of him. I'll cut off his cock"; (17) nudity at the clinic with again an emphasis on the genital area of the male and female.

> whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'
>
> "We recognized and applied this latest statement of the applicable rule in *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320-21 (1967), in which we sustained the Circuit Court and the Board in their finding that certain films, shown in an arcade in 'the Block' in Baltimore, were obscene. . . ." *Id.* at 182-83.

See also *Redrup* v. *New York*, 386 U.S. 767, 770, 771 (1967).

Applying the tridentated test of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966), as adopted by this Court in *Hewitt*, *supra*, and *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967), and set forth above, we find the film qualifies as obscene under all three categories. In arriving at this conclusion we cannot ignore the visual impact of a motion picture as contrasted with the printed word. *I Am Curious-Yellow*, *supra* (Lumbard, J., dissenting); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). Cf. *Landau* v. *Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456 (1967).

It should be noted that this is not a case wherein we are bound to follow the ruling of the lower court unless we find it to be clearly erroneous (Maryland Rule 886 a), but rather the duty of this Court is to make an independent constitutional judgment on a mixed question of law and fact, as to whether the subject matter before us is obscene. This obligation was cogently expressed by Judge

Oppenheimer, writing the opinion of this Court in *Sanza, supra*, wherein he stated:

> "In determining whether the films are obscene, we are deeply mindful of our obligation to make an independent constitutional judgment on the facts of the case, *Jacobellis, supra*, at 378 U.S. 190, and that the administration of a censorship system for motion pictures presents peculiar challenges to constitutionally protected speech. *Freedman, supra, at* 380 U.S. 57. We are mindful too that 'we are judges, not literary experts or historians or philosophers,' *Fanny Hill, supra*, concurring opinion of Mr. Justice Douglas at 383 U.S. 427, and that ordinarily neither the judge who may sit in the circuit court, review the action of the Board nor the judges of this Court would be qualified to determine whether a film fails to meet the three tests laid down in *Roth-Alberts* without enlightening testimony. *Dunn, supra*, 240 Md. at 255." *Id.* at 330.

In addition to viewing the film we have reviewed the testimony of the many experts contained in the record representing views, both pro and con, as to the social, artistic and cultural attributes of the film or the lack thereof. The witnesses for the petitioners, as well as the exhibitor, were individuals who possessed respected artistic, educational and cultural backgrounds in the Baltimore area. We see little need to repeat their opinions but want it known that we have considered them in reaching our conclusions.

This Court has little difficulty in finding that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters. It is only with regard to the third element of the "Roth-Alberts" test as set forth in *A Book* v. *Attorney General, supra*, which must coalesce with the other two standards,

which presents any occasion for pause. However, after reviewing all of the evidence in a light most favorable to the appellants' contention that the film does have something of social value, it is our judgment that it is utterly without redeeming social value. We have previously, in this opinion, stated that the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived. We do not think that Lena's concern with social and political problems, so artificially depicted, supplies the redeeming social quality required to sustain the film. We find no meaningful nexus between this concern and her problem with her twenty three lovers. As was stated by Judge Lumbard in his dissent [4] in *I Am Curious, supra*:

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

[4] On October 6, 1969, the United States District Court for the District of Kansas had before it the cases of Grove Press, Inc. v. Kansas and Lakeside Drive In Theatre, Inc. v. Menghini, et al. (Nos. KC-2992 and KC-2997), wherein the obscenity statutes of Kansas were challenged and injunctions were sought to enjoin proceedings pending in the District Courts of Johnson County and Wyandotte County, Kansas, and which proceedings concern the question of the application of the Kansas statutes to the film "I Am Curious (Yellow)." The Court found the statutes constitutional and did not reach the obscenity question. However, the Court stated that "All Judges on the present Court agree with Judge Lumbard's statement [dissent], but because we did not reach the question, we do not so hold."

> "While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture." *Id.* at 203.

or as Judge Murphy, who presided in the United States District Court for the Southern District of New York at the trial of *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 285 F. Supp. 465 (1968) observed:

> "If the film has a message, whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hardcore pornography." *Id.* at 472.

Finding nothing in this film that merits the protection of the First Amendment of the United States Constitution, we are of the opinion that it should be disapproved for licensing under Maryland Code, Article 66A, Section 6.

The appellants raise other issues of a technical nature which we shall proceed to discuss.

The appellants complain that at the hearing in the lower court, the trial judge refused to order the Attorney General's office to disclose the names of all the experts which they requested to view the film. An analogy is made to the situation where due process of law requires that the State, upon request, divulge all evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Barbee v. Warden*, 331 F.2d 842 (4th Cir., 1964); *United States v. Poole*, 379 F.2d 645 (7th Cir., 1967); *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

It is not disputed that the hearing before the lower court in censorship cases is of an adversary nature. In the

instant case the appellants requested not only the names of the actual witnesses which the State proposed to use at the hearing, but all of the individuals who may have been requested by the State to view the film for the possible purpose of being used as a witness, or for consultation with the State concerning the obscene aspects of the film. We do not think that discovery in civil cases as promulgated by Maryland Rule 417 goes to that which is in essence the work product of the attorney accumulated in the preparation of the case. Furthermore, if it were to be contended that Maryland Rule 728 relating to discovery in criminal cases were applicable, we think the opinion of this Court in *Kardy v. Shook, J.*, 237 Md. 524, 540, 207 A.2d 83 (1965) dispositive of the issue, wherein Prescott, C.J., writing for the Court stated:

> "... And, in *Williams v. State*, 226 Md. 614, we held that where a demand for a bill of particulars went far beyond what was required under Rule 728 and was calculated, not so much to amplify the allegations of indictment, but 'to require complete disclosure by the State of the evidence it relied upon,' the court was justified in sustaining the State's exceptions to the demand." *Id.* at 540.

The appellants also attacked the constitutionality of the prior restraint procedure provided by the Maryland Statute (Art. 66A). We think these contentions were generally answered by this Court in *Trans-Lux Distrib. Corp. v. State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965), which reviewed the Maryland Statute in light of its amendment by Chapter 598 of the Acts of 1965, which amendment had the effect of revising Section 19 of Article 66A to conform to the guidelines suggested by the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965).

The appellants further contend that the Board acted with insufficient evidence to sustain its refusal to license the film and that because of this the lower court lacked

jurisdiction to enter an order disapproving the film. Without entering into a prolonged discussion, as to whether the administrative procedure followed by the Board is not subject to review where it is clear that there has been a *de novo* judicial determination, *Universal Film v. Chicago*, 288 F. Supp. 286 (1968), we think that the Board made a conscientious effort to follow the guidelines set forth in *Hewitt v. Board of Censors*, 234 Md. 574, 585, 586, 221 A.2d 894 (1966), and that there was sufficient expert testimony on which it could properly base its decision.

Finally, the appellants argue that the judgment of the United States Court of Appeals for the Second Circuit in *I Am Curious (Yellow), supra*, is conclusive on the State's case, in that the federal statute under which adjudication was made must be read as preempting the right of a state later to subject the film to further restraint in advance of public showing. The short answer to this is that the United States Supreme Court in *Freedman v. Maryland, supra*, recognized that as long as a state follows the procedural safeguard suggested therein, it may validly exercise its police power to effectuate a censorship system. It is our belief that only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us. Constitution of Maryland, Declaration of Rights, Article 2.

In affirming the lower court's order disapproving the film "I Am Curious (Yellow)" for licensing on the basis that it is obscene, we are mindful of Justice Stewart's observation in *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) that, "Censorship reflects a society's lack of confidence in itself"; yet, we are likewise sensate to our obligation to withhold the protection of the First Amendment from material which those who wrote the Constitution never intended to protect.

ORDER AFFIRMED, APPELLANTS TO PAY COSTS.

Barnes, J. concurring:

I entirely concur with the reasoning, statement of facts and application of the law in the opinion of the Court. I am of the opinion, however, that (a) additional emphasis should be given to the pandering aspect of the case when the third test of "utterly without redeeming social value" is considered and (b) there should be additional comment upon the scope or applicability of this third test when the Court has before it a motion picture which is obscene under the first two tests in regard to prurient interest in sex and an affront to contemporary community standards.

In the majority opinion, in considering the third test, the pandering aspect of the case is suggested by the observation that the film makers' attempt to raise so called "social questions" was "patently strained and contrived" and the result was so "artifically depicted" as failing to supply the "redeeming social quality required to sustain the film." The majority opinion also cites with approval a portion of Chief Judge Lumbard's dissenting opinion in *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196, 202, in which he states, "Needless to say these acts (of fellatio and cunnilingus) bear no conceivable relevance to any social value, except that of *box office appeal.*" (Emphasis supplied.) *Id.* at 203. With these observations, I heartily concur, but I would additionally emphasize that the record discloses to me that there is substantial evidence which indicates the pandering of sex. This pandering, in my opinion, brings the present case within the ambit of the decision of the Supreme Court of the United States in *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

In *Ginzburg*, there was a clear majority of five justices for the opinion of the Court, *i.e.*, Mr. Justice Brennan, who wrote the majority opinion, with the concurrence of Warren, C.J., Clark, White and Fortas, J.J. Justices

Black, Douglas, Harlan and Stewart dissented and each wrote dissenting opinions.

The opinion of the Supreme Court in *Ginzburg* stated:

> "This evidence (of advertising), in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (383 U.S. at 470, 86 S.Ct. at 947, 16 L.Ed.2d at 38)

We cited and followed *Ginzburg* in *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967) and recently in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 193-95, 254 A.2d 203, 210-211 (1969), involving the motion picture "Odd Tastes."

The pandering of sex in the present case is not of the same nature as that involved in *Ginzburg* and the evidence in regard to it is not as clear and definite as was the evidence in *Hewitt, supra.* In the instant case the pandering aspect is more subtle, but it is present none the less.

In the scenario, which apparently is prepared for sale in conjunction with the motion picture, there is an obvious emphasis on the sexual aspects of the motion picture revealing as its object the "marginal gain for the creator through an appeal to the sexual curiosity and appetite." *Ginzburg, supra,* 383 U.S. at 471, 86 S.Ct. at 947-948, 16 L.Ed.2d at 38. It is apparent from looking at the scenario that there is a larger proportion of photographs of the sexual scenes that in the motion picture and Dr. Macksey, an expert witness for the appellants, stated, in effect, that the use of the series of stop action frames depicting the sexual scenes served to emphasize the sexual theme in the motion picture. In my opinion, these facts bring the present case within the *Ginzburg* decision which indicated that the animation of sexual detail to give the publication in that case a salacious cast amounted to an appeal to the sexual curiosity and appetite and amounted to the pandering condemned in that case.

The Attorney General aptly commented on this aspect of this case in the lower court:

> "You have a book on the cover says 250 illustrations. If you count the illustrations in this book, you will find approximately 100 of the 250 have to do with sexual themes, out of the 250. That is 100 out of 250, which is forty percent of the total against six minutes of 120 minutes or 135 minutes of the film, and if you will look you will find that in a period of some —pages 89 to about 160, you have some 83 or 80 sexual pictures against 60 others, which is about a hundred and twenty-five percent, which indicates there

is a very significant emphasis on the pornography we say is in the film in this book, * * *"

It thus appears that the pandering of sex in the motion picture is generated entirely by the profit motive. By the concentration on sex in the scenario, Grove Press sells the book and by selling the book it sells the sex in the motion picture.

The argument by the appellants (if relevant at all) that the motion picture will be shown only to those members of the community 18 years of age or older is rather impaired by the findings by the District Court of Johnson County, Kansas, in a recent case entitled "*The State of Kansas v. A Motion Picture Film Entitled 'I Am Curious—Yellow*'", No. 6122, Div. No. 1, in which the Order was filed on September 5, 1969, and modified in a detail of no importance for this case on September 15, 1969. A copy of the opinion of District Judge Herbert W. Walton in this Kansas case was forwarded to this Court by the Attorney General on October 1, 1969, a copy being sent to counsel for the appellants. In the Kansas case, the motion picture involved in the case at Bar was shown at the Kimo South Theatre (an "art theatre") in Overland Park, Johnson County, Kansas. Advertisements furnished by Grove Press for the motion picture published in the Kansas City Times and the Kansas City Star from June 17 to June 24, 1969, stated, "Admission restricted to adults." The motion picture was advertised as a "landmark likely to permanently shatter many of our last remaining movie conventions,' says William Wolfe of Cue Magazine." In none of the advertisements, other than the one of June 21, 1969, was there mention of any other theme. The District Court found that although the advertisement on June 21 mentioned such "alleged themes as politics, nonviolence, Zen, commitment, socialism and other subjects, the whole import of the advertisement and the attention of the reader are centered on the obvious and purposeful deletion which implies the word 'sex.'"

In the newspaper advertising of June 18, 1969, no mention was made at all of age restrictions; on June 19, 20 and 21, there was a restriction to persons over 18 years of age with suitable identification; on June 22, there was a restriction to those 18 years and over; and, on June 23 and 24, the advertisements simply stated "adults only."

The enforcement officers took random samplings on the evenings of June 22, 23 and 24, 1969, among persons leaving the theatre (which seats approximately 325 persons) who appeared to be under 21 years of age. One officer on Sunday, June 22, stopped 10 persons, three of whom were under 21 years of age; of the persons stopped by the other officer on the same night, seven were under 21 years of age. On Tuesday evening, June 24, from those stopped six were under 21 years of age and of those, three were under 18 years of age. On June 22 also, the ticket seller at the theatre sold a ticket to view the motion picture to an identified lad, 17 years of age, without asking the youth his age or asking to see his identification. The lad was thereafter admitted, the ticket taker neither asking his age nor for identification. There were similar episodes on June 24, 1969.

The Contract of May 18, 1969, between Dickinson Operating Co., Inc. through Glen W. Dickinson, Jr. and Grove Press, Inc. through Barney Rosset, one of its chief officers, to exhibit the motion picture at the Kimo South Theatre provided that Grove Press, Inc. would receive 90% of the gross receipts in excess of $1,500 a week, but not less than the following fixed percentages: first week: 70%; second and third weeks: 60%; fourth and fifth weeks: 50%; sixth week: 45%. The minimum run was to be for six weeks with additional time to be negotiated. Grove Press, Inc. was to pay 90% of the advertising costs and all advertising materials content and costs were to be at the discretion of Grove Press, Inc. The contract further provided that Dickinson Operating Co., Inc. was to exhibit

the film in its entirety and was not to cut or alter the print, other than to make necessary repairs or when required by a public official or authority, x without the written consent of Grove Press, Inc.

(b)

As the majority points out, we applied the *Roth* test as restated and amplified in *Memoirs* to a motion picture in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 182-83, 254 A.2d 203, 205 (1969), *supra*, and the restated "rule" has been applied in the present case. In my opinion, in view of the uncertainty in regard to the view of a majority of five justices of the Supreme Court on various aspects of the applicable test, it was wise for us in *Hewitt*, *supra*, as well as in the instant case, to apply the most detailed and comprehensive test enunciated by the justices writing for a majority or a plurality of the Supreme Court in the obscenity cases in that Court. As I have indicated, it is my opinion that the film in the case at Bar is well within the three tests mentioned and is obscene under those tests.

The able argument of the Attorney General and of the Assistant Attorney General, both in the appellee's brief and orally before us, has made me doubt, however, that the third test *i.e.*, that the material is "utterly without redeeming social value"—at least in its full vigor—is properly applied to a motion picture because of the difference between motion pictures, on the one hand, and novels, pamphlets and other writings, on the other.

As early as 1952 when the Supreme Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("The Miracle"), in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, JJ.

concurring; there were no dissents) observed the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." (343 U.S. at 502-503, 72 S.Ct. at 781, 96 L.Ed. at 1106)

Mr. Justice Clark in his concurring opinion in *Kingsley Pictures Corp.* v. *Regents* ("Lady Chatterley's Lover"), 360 U.S. 684, 702, 79 S.Ct. 1362, 1372, 3 L.Ed.2d 1512, 1524 (1959) stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'." (Emphasis in original.)

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman* v. *Maryland*, 380 U.S. 51, 60-61, 85 S.Ct. 734, 740, 13 L.Ed.2d 649, 656 (1965) that:

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Circuit Judge Hays, in the Second Circuit case involving the film in this case in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books." (404 F.2d at 198)

In the State Courts the distinction between the two methods of expression has been carefully and fully pointed out. In *Laudau* v. *Fording*, 245 Cal. App.2d 820, 54 Cal. Reptr. 177 (1966) the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman* v. *Maryland*, 380 U.S. 51, at p. 61 [13 L.Ed.2d 649, 85 S.Ct. 734]). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal.L.Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., *supra*, at p. 708).
>
> "Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." *Id.* at 181.

See also the interesting discussion of this matter by the Court of Appeals of New York in *Trans-Lux Dist. Corp.* v. *Board of Regents*, 14 N.Y.2d 88, 248 N.Y.S.2d 857 (1964), *rev'd per curiam*, 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959 (1965) citing only *Freedman* v. *Maryland*, *supra*, from which it can be inferred that the reversal by the Supreme

Court was on the basis of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity. Cf. *Teitle Film Corp. v. Cusack*, 390 U.S. 139 (Note 1), 88 S.Ct. 754, 19 L.Ed.2d 966 (1968) in which the Supreme Court held a Chicago statute invalid under *Freedman*, but noted that it had not considered the issue of obscenity.

The *Roth* test was "*whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*" and it is the *only test* in which a *majority of five justices* of the Supreme Court have ever agreed.

In the *Roth case*, 354 U.S. 476, 483-485, 77 S.Ct. 1304, 1308-1309, 1 L.Ed.2d 1498, 1506-1507 (1957), the Supreme Court stated:

> ". . . the unconditional phrasing of the First Amendment was not intended to protect every utterance . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire* . . . 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of

such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and *morality*. . . ." (Emphasis ours.)

The Supreme Court continued:

"We hold that obscenity is not within the area of constitutionally protected speech or press."

The Court then set out the *Roth* test above set forth.

When then, did the other two tests, *i.e.*, (a) the material must be "patently offensive" and (b) it must be "utterly without redeeming social value" purportedly come into the law?

Apparently, the "patently offensive test" came from the opinion of Mr. Justice Harlan in his opinion in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482, 82 S.Ct. 1432, 1434, 8 L.Ed.2d 639 (1962). This "test," however, only received the concurrence of Mr. Justice Stewart in this case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan. Mr. Justice Black concurred in the result without opinion; Mr. Justice Clark dissented and filed a dissenting opinion. Frankfurter and White, JJ., took no part in the decision. A review of subsequent cases does not indicate to me that a majority of the Supreme Court has committed itself in any one case to the "patently offensive test." Hence, the doctrine of *stare decisis* does not commit the Supreme Court to the "patently offensive test."

The "*utterly* without redeeming social value test" (emphasis supplied) as applied to media pictures apparently came from the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) involving the French motion picture "Les Amants" ("The

Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion by Messrs. Justice Brennan, Black, Douglas and Stewart, JJ., concurring in the judgment only. Mr. Justice Harlan dissented as did Mr. Justice Warren and Justice Clark, so that this "test" did not receive the approval of a majority of the Supreme Court.

Some have thought that the third "test" was finally brought into the law by the decision in *Memoirs, supra;* in 1966. But, alas, again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, indeed, in his dissenting opinion in *Memoirs*, observed that the social value test was "novel" and that *only three* members of the Supreme Court held to it. He further pointed out that, in his opinion, such a test *rejects* the *Roth* test to which, as above indicated, a *majority* of the Supreme Court *did agree*.

Even in the case of *Redrup* v. *New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967)—discussed at some length by us in the recent *Howitt* case, *supra*—the *per curiam* opinion of the Supreme Court was careful to state that the necessity of meeting the three point test was one held *only* by certain justices in *Memoirs*, and did not cite the three point test as the test of the Supreme Court.

Where does this extraordinary situation leave the lower Federal Courts and State Courts in their required effort to apply the *decisions* of the Supreme Court of the United States in obscenity cases? Like the policeman in Gilbert and Sullivan's "H.M.S. Pinafore," their "lot is not a happy one." I have concluded that this Court is not *required* to follow the "three point test" in motion picture cases so far as any *authoritative and binding holding* of the Supreme Court of the United States is concerned, but that we are required to apply and follow the original *Roth* test. This conclusion is indirectly of some importance in the

present case because of the statement in the concurring opinion of Circuit Judge Friendly in the Second Circuit case:

> "If the governing rule were still what Mr. Justice Brennan stated in *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), namely 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' I might well join Chief Judge Lumbard for affirmance." (404 F.2d at 200)

As I have concluded that the governing rule is, indeed the *Roth* test, this would mean that the very excellent opinion of Chief Judge Lumbard *really* should be the opinion of the Second Circuit in that case. I might add parenthetically that, in my opinion, it should have been the majority opinion even on the other theory.[1]

I reiterate, however, that I think this Court was wise in both the recent *Hewitt* case, *supra*, and in view of the majority opinion to apply the "three point test" in view of the unsettled state of the decisions of the Supreme Court in the obscenity field. If a majority of the Supreme Court finally adheres to the three point test (unfortunately from my viewpoint), we will have applied the correct rule; if a majority finally adheres to the *Roth* test, the appellants cannot complain if we have applied a stricter test than the law, as ultimately determined, required us to do.

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[1] I note in support of my position that the three judge court for the United States District Court for the District of Kansas, consisting of Hickey, Circuit Judge, and Stanley and Theis, District Judges, in the recent case of Grove Press, Inc. v. State of Kansas, et al. and Lakeside Drive In Theatre, Inc. v. Menghini, et al., Nos. KC-2992 and KC-2997 (consolidated cases) in a per curiam opinion filed October 6, 1969, unanimously agreed with Chief Judge Lumbard's opinion.

I might add that, as we observed in the *Hewitt* case, *supra* (254 Md. at 195, 254, A.2d at 211), Mr. Justice Marshall in the recent case of *Stanley* v. *Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249-50, 22 L.Ed.2d 542, 551 (decided April 7, 1969), seems to equate the cases subsequent to the decision in *Roth* as continuing the *Roth* test as he stated, for the Supreme Court:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his home."

I add finally that although the "national" community standard may well be thought to apply reasonably to decisions of the Federal Courts involving the nation as a whole, and the expert testimony in the present case is sufficient to support the conclusion that the film does offend a national community standard, I have grave doubts that a majority of the Supreme Court will ultimately decide that in the exercise by the States of their "broad power to regulate obscenity," the States will be required to apply a "national" rather than a "State" standard as the "contemporary community standard." When a State seeks to clean the Augean stables of obscenity or to prevent the offending material from accumulating, it should be able to consider and apply the community standard of its own community, and not be required to attempt to evaluate the standards of other communities not under its jurisdiction. I hope indeed that a majority of the Supreme Court of the United States will ultimately reach this conclusion.

McWILLIAMS, *J.*, dissenting

I do not agree with the majority's conclusion that the State has met its burden of satisfying the "Roth test." We have held that the triple standard announced by the Supreme Court in *Roth* v. *United States*, 354 U.S. 476 (1957), *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (opinion of

Brennan, J.), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413 (1966) (opinion of Brennan, J.), is the standard to be applied in Maryland in determining whether certain writings or pictures, including motion pictures, should be afforded constitutional protection or whether they are obscene and therefore ineligible for an exhibition license.[1] Because I think the film is not "*utterly* without redeeming social value," I would (reluctantly and with regret) reverse the court below.

Mr. Justice Brennan, in his opinion in *Jacobellis, supra*, said the *Roth* decision recognized

> "* * * that obscenity is excluded from the constitutional protection only because it is "utterly without

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[1] I am not impressed with the argument of my brother Barnes in his concurring opinion that "we are *required* [emphasis added] to apply and follow the original *Roth* test" inasmuch as that is the only test which has been expressly approved by a majority of the Supreme Court at any one time. *See* Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Supp. Ct. Rev. 7. It is important to note, however, that the intent of the Supreme Court when it established the "original" *Roth* standard was to provide "safeguards adequate to withstand the charge of constitutional infirmity." *Roth v. United States*, 354 U.S. 476, 489 (1957). Mr. Justice Brennan, writing for a majority of the Court in *Mishkin v. New York*, 383 U.S. 502 (1966), pointed out that "[s]tates are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition * * *." *Id.* at 507. There is also little doubt that the "three-point" test favored by this Court, a plurality of justices of the Supreme Court, and by a substantial majority of the several states, *see* 5 A.L.R. 3d 1138 (1966) and Later Case Service, is sufficiently adequate "to withstand the charge of constitutional infirmity." We might also note that although, as Judge Barnes indicates, a majority of the Supreme Court has not agreed on any one standard since *Roth*, it clearly appears that the standard set forth in that case would not receive the approval of a majority of that Court today. *See Redrup v. New York*, 386 U.S. 767, 770-71 (1967) (per curiam).

> redeeming social importance,' and that 'the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.* at 484, 487." *Id.* at 191.

As a result, he said

> "* * * that 'material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Id.*

We cited the opinion of Mr. Justice Brennan with approval in *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 105 (1965).

In *Memoirs* (i.e., *Fanny Hill*), *supra*, Mr. Justice Brennan wrote that courts could not disregard the word "utterly" when applying the third element of the standard which we follow. We complied with Mr. Justice Brennan's caveat in *Hewitt* v. *Maryland State Board of Censors*, 243 Md. 574 (1966), where we decided that the film "This Picture Is Censored" was not obscene and we referred to his conclusion that the Massachusetts court had "misinterpreted the social value criterion." We quoted the following passage of the Massachusetts court's opinion to illustrate its application of the social value criterion:

> "'It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was *expert testimony, much of*

which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene.' (Emphasis supplied.)" *Id.* at 595.

We also noted Mr. Justice Brennan's interpretation of the criterion:

"Hence, even of the view of the court below that *Memoirs* [Fanny Hill] possessed *only a modicum of social value*, its judgment must be reversed . . ." *Id.* (Emphasis added.)

We concluded our opinion by stating that

"* * * we have no difficulty whatever concluding that if *Memoirs* has 'redeeming social value,' then, *a minori*, so does the film in this case, however, cheap, dull and tawdry it may be * * *. The testimony of the 'experts' produced by the Board support, not the finding of the trial judge, but a finding that the film is 'not *utterly* without redeeming social value.' (Emphasis supplied.)" *Id.* at 596.

As I see it, based on my reading of *Roth*, *Jacobellis* and *Fanny Hill*, and our own decision in *Hewitt*, a motion pic-

ture [2] will be constitutionally protected if there is a mere *presence* of matters of social importance even though the matter may, in fact, be outweighed by the film's prurient appeal. *See Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963).

Applying the above observations to this film I question that it is obscene in the technical sense. The majority found it unnecessary to detail the opinions of the many expert witnesses who testified but it seems to me that some comment should be made. The defense offered an impressive array of witnesses. Some who testified are considered to be the foremost authorities in this state on

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[2] In its opinion the majority indicated that "* * * we cannot ignore the visual impact of a motion picture as contrasted with the printed word." Judge Barnes in his concurring opinion seems to suggest that different standards apply to the determination of obscenity in books as opposed to motion pictures. This state, of course, has always recognized that there are differences between the two medias and it has subjected motion pictures to a censorship scheme of prior restraint. The written word is not subject to such restraint although its possession may be a criminal offense if it is obscene. Code, Art. 27, §§ 417-18 (1967) (Repl. Vol.). The Supreme Court has approved the prior restraint of motion pictures so long as the censorship scheme has procedural safeguards. *Freedman* v. *Maryland*, 380 U.S. 51, 60-61 (1965). However, the Supreme Court has never held that the standard applied to books as opposed to films should not be the same. As Judge Friendly put it:

> ". . . I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation, which might import further confusion into a subject already sufficiently confounded. *Jacobellis* related to a film and neither the majority nor the dissenting opinions suggested that any stricter standard would apply. The 5-to-4 *per curiam* affirmance in *Landau* v. *Fording*, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967), affords too frail a foundation to support a construction of this sort." *United States* v. *A Motion Picture Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 201 (2nd Cir. 1968) (concurring opinion).

the motion picture, and of these a few have testified for the State in previous censorship cases. Dr. Richard A. Macksey, Acting Director of the Humanities Center of the Johns Hopkins University, stated that he has taught more than a dozen different courses about films and film making and that he is a member of the Board of the Maryland Film Festival. He said the film is "concerned clearly with * * * conflicts between generations," "the doctrine of non-violence as this relates to Sweden's particular role in Europe" and with "the kind of malaise of the so-called welfare state in Sweden, the ostensibly classless society." The film, he continued, covered "a wide range of social attitudes" and had "artistic merit."

Dr. Lincoln F. Johnson, Chairman of the Fine Arts Department of Goucher College, has studied motion pictures seriously for 18 years and he regularly teaches courses in the history of motion pictures and film productions. He has served also on the selection body for the American Film Festival and he views "between 100 and 150" commercial films a year. He testified that the film has "cultural significance" and "cinematic merit."

Dr. Peter H. Rossi, a sociologist, is Chairman of the Department of Social Relations of the Johns Hopkins University. He has held editorial positions on three sociological journals and he has been a consultant to the Commission on Pornography and other national commissions as well. He testified that the film has "social significance" inasmuch as it is descriptive of the criticism by young people throughout the world of the present form of society. As Dr. Rossi put it:

> "Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but is critical of the Chinese, the Russians and the like. It is not a very articulated message. It is a film which

says there is something wrong and it is a film which says also that young people like the heroine are searching for a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives."

Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland (Baltimore campus), has made a serious study of the theater arts. He testified that the film has "artistic merit" inasmuch as it made "a good try at some interesting forms, using a number of different frameworks and a number of themes; trying to do a number of things at the same time."

Dr. Ronald H. Paulson is Professor of English and Chairman of the English Department of the Johns Hopkins University. Dr. Paulson stated that he views, on the average, two films a week and that he has published works on literary criticism. He further testified that "* * * this is a film with * * * artistic esthetic merit. It holds together; it is relatively coherent, judged by the very best movies; it is dealing with an important subject, * * * [the] breakdown in the relationship between the symbols of authority and the people, between parents and children." Moreover, he stated that the film has social merit "in the sense that it is dealing with important social problems."

Jaromir Stephany is Chairman of the Department of Photography and Films at the Maryland Institute and he teaches courses in film making and film history. Additionally, he has been Chairman of the Maryland Film Festival and he has appeared in court on three occasions to testify for the Board of Censors. He testified that the film has artistic merit and he offered the further comment that "[i]t is rather strongly put together" and "is certainly one of the outstanding films made within the last year."

The testimony of the State's witnesses was less impressive. Reuben Kramer testified that the movie was "totally

inartistic" inasmuch as the sex scenes "contaminated the picture." He conceded that he does not regularly attend the movies and has no expertise in the "cinematographic art medium." Furthermore, he stated that in his opinion, very few films have any artistic merit and "are just stupid." However, he indicated that this film "is not stupid."

William Forshaw, Senior Subjects Specialist in the Humanities Department at the Pratt Library, testified that he is "interested in the preservation of American film" and is a film consultant and historian to the Baltimore Museum of Art. He stated that in his opinion, which he described as a minority one among his colleagues, the film had no social or literary merit.

Dr. Paul Yaffe is employed by the Baltimore City Schools as Director of the Educational Testing Service. He is also a part-time practicing psychologist with "more than average ability in the area of projective techniques." He emphasized that he did "not pose as an expert of films, either from experience or study." Dr. Yaffe testified that in his opinion the film "pretended' to have social redeeming value. He pointed out that "the socially meaningful situation is * * * shallow and if the film were to stand on it alone it could have no real redeeming features in the sense that it would be instructional or would clarify situations, and the like."

It is interesting to note that Judge Carter in the court below stated that he was " * * * impressed by the testimony of one witness, at least as * * * [he] interpreted it, who testified that * * * this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes."

The reviews produced by the appellant were written by prominent movie critics and they were equally impressive. Hollis Alpert, whose reviews have been noted by this Court in previous decisions, *see Trans-Lux Distributing*

Corp. v. Maryland State Board of Censors, supra, wrote in the Saturday Review that the purpose of the film's director was " * * * to explore and say something, through cinematic methods, about the political and social climate of his country, Sweden." To the same effect are the reviews of Richard Schickel in Life, Vincent Canby in the New York Times, John Simon in the New York Times, Richard Atcheson in Holiday, Gregory McDonald in the Boston Evening Globe, Bernard L. Drew in The Hartford Times, Ernest Schier in the Philadelphia Bulletin and the reviewer of the National Observer. The film was reviewed unfavorably by James A. Kilpatrick in the Los Angeles Times and Rex Reed in the New York Times.

The Attorney General does not deny that the credentials of the appellant's witnesses are impressive, but he argues that "this does not free the opinions they expressed from critical analysis." I must agree, I am bound to say, however, that they reflect at least "a modicum of social value." *Memoirs, supra; Hewitt, supra.* I cannot agree with the majority, however, that the film's social and sexual themes were not intertwined. As Judge Hays put it:

> "It is even more clear that 'I Am Curious' is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the 'experts' who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual efforts that the First Amendment was designed to protect." *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 299-200 (2nd Cir. 1968).

Judge Friendly, in his concurring opinion, said he did not feel that the sexual episodes " * * * were simply lugged

in and bore no relationship whatever to the theme." Moreover, he could not " * * * conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting." *Id.* at 201.

Finally, I must take issue with Judge Barnes' suggestion that *Ginzburg v. United States*, 383 U.S. 463 (1966) is dispositive of this case. I should point out that *Ginzburg* did not involve a censorship scheme of prior restraint nor did it involve a motion picture.[2] It is difficult to see how evidence of the type of "pandering" found by the Supreme Court in *Ginzburg* will ever be present where, as here, the film can neither be shown nor would it be advertised until it is approved and licensed by the Board of Censors. *See United States v. 4400 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967). To be sure we did find evidence of pandering in our recent decision in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179 (1969). The evidence in that case revealed that the theaters at which the film—"Odd Tastes"—was to be shown specialized in the exhibition of "sex-ploitation films." It was evident also that the film's title was highly suggestive per se. Evidence of this sort is not present in the case at bar. The film was scheduled to be exhibited in Baltimore at the 7 East Theatre. The type of film normally exhibited at this theater (and its sister theater—5 West) is described in the following exchange between the appellant's attorney and Dr. Johnson:

> "Q. (Mr. Weiner) How does this film, "I Am Curious (Yellow)", fit in with the other films which are shown

[2] *Ginzburg*, of course, involved the pandering of a book and a magazine. The Supreme Court has not, to date, held that the *Ginzburg* doctrine is applicable to motion pictures. It is also apparent that the Court will limit *Ginzburg* to its facts. *See Redrup v. New York*, *supra*, and *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam), *noted in* 19 Case W. Res. L. Rev. 748 (1968).

at those theatres? A. Well, first of all, it is a foreign film. Secondly, it is a film, in my mind, of exceptional merit, and thirdly, films shown in these two theatres seriously consider serious problems. These two theatres show films which are not simply entertainment films. They are films which are important artistically, which have some cultural significance, which raise questions of importance, and I am sure influence public opinion.

"Q. And in your opinion, does the film 'I Am Curious (Yellow)' do these things that you have just described? A. Oh, *yes*, indeed."

Furthermore, it is not claimed nor does it appear that the title of this film, standing alone, is suggestive of its content. *Compare* the evidence of pandering found by Chief Judge Murphy in *Lancaster* v. *State*, 256 A. 2d 716 (Md. App. 1969).

I have no doubt that the notoriety this film has acquired has been more the result of the abundant publicity generated by the confiscatory action of the United States Customs Service, the ensuing decisions of the federal courts and the film's financial success than any one advertisement or book.[1] I expect the film's reputation will not suffer as a result of the action of my brothers of the majority.

It must not be supposed, however, that I have any enthusiasm for this film. I did not enjoy seeing it. I thought

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[1] According to the appellant, "[t]he film was distributed nationally and it first opened in New York City on March 19, 1969. As of July 1, 1969 * * * it has been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland. The film is currently being shown in these places, some of which are in the jurisdictions contiguous to the State of Maryland, and contracts have also been executed with exhibitors for showing in 27 additional cities."

it was a crashing bore. Nevertheless it is not for us "to determine the quality of a * * * [film]. Our duty is to respect and enforce in full measure the freedom of expression guaranteed by state and federal constitutions." *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 151, 121 N.W. 2d 545, 554, 5 A.L.R. 3d 1140, 1152 (1963).

Chief Judge Hammond and Judge Singley have authorized me to state that they concur in the views expressed in the foregoing opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of Maryland, entered on October 22, 1969 (App. B., p. 37a *infra*), affirming the order of the Circuit Court of Baltimore City (App. C, pp. 38a-46a *infra*) disapproving the film "I Am Curious (Yellow)" for licensing under the Maryland Motion Picture Censorship Law, Art. 66A, Md. Code Ann. (1964 ed. and 1969 Supp.).

OPINIONS BELOW

The three opinions filed in the court below (a majority opinion for four judges, a supplementary concurrence by Judge Barnes, and the dissenting opinion of Judge McWilliams, joined by Chief Judge Hammond and Judge Singley) are not yet reported. They are reprinted as Appendix A, pp. 1a-36a *infra*. The opinions of the United States Court of Appeals for the Second Circuit in *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (1968), are reprinted in Appendix D, pp. 47a-62a *infra*.

JURISDICTION

This action was instituted by the Maryland State Board of Censors in the Circuit Court of Baltimore City pursuant to Md. Code Ann., Art. 66A, § 19, for a judicial determination as to the obscenity of the film "I Am Curious (Yellow)." The judgment of the Court of Appeals of Maryland, affirming the judgment of the Circuit Court, was entered on October 22, 1969, and a notice of appeal was filed on November 4, 1969. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2). See, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *A Book Named "John Cleland's Memoirs of A Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966); *Mishkin* v. *New York*, 383 U.S. 502 (1966).

STATUTE INVOLVED

The Maryland motion picture censorship statute, Md. Code Ann. Art. 66A, is set out in Appendix J, pp. 91a-102a *infra*.

QUESTIONS PRESENTED

1. Whether Maryland's motion picture censorship statute (Md. Code Ann., Art. 66A) has been applied in this case to prevent the exhibition of a film ("I Am Curious (Yellow)") which is protected from interference under the First and Fourteenth Amendments' guarantees of freedom of expression.

2. Whether the system of prior restraint imposed on the exhibition of motion pictures by the Maryland censorship statute, on its face or as applied, exceeds constitutional limits.

3. Whether the First and Fourteenth Amendments prohibit multiple State and local obscenity proceedings against a work adjudged by a federal court as a matter of constitutional law to be non-obscene and constitutionally protected in an action binding on the United States.

4. Whether application of the Maryland censorship statute to the exhibition of a film in a privately owned theatre for the benefit of adults who pay admission and voluntarily choose to view the film violates the First and Fourteenth Amendments under the constitutional principles applied in *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

5. Whether the procedures followed in this case by the Maryland State Board of Censors and by the courts below failed to meet constitutional standards.

STATEMENT

The motion picture "I Am Curious (Yellow)" was imported from Sweden on December 30, 1967, for distribution and exhibition throughout the United States. Shortly after arrival at Kennedy International Airport

in New York, it was seized by officials of the United States Bureau of Customs and forfeiture proceedings were instituted by the Government in the United States District Court for the Southern District of New York. The action was defended by appellant Grove Press, Inc. (hereinafter "Grove"), the importer and owner of the United States distribution rights in the film. After a jury trial, the District Court entered a judgment finding the film obscene, but upon appeal to the United States Court of Appeals for the Second Circuit, this judgment was reversed, and on November 28, 1968, eleven months after importation, a final order was entered, requiring the release of the film for distribution. *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (2d Cir., 1968), reprinted as Appendix D, pp. 47a-62a *infra*.

On February 18, 1969, prior to exhibition of the film in any theatre in the United States, Grove entered into a contract with appellant 5 West Amusement Co., Inc. (hereinafter "West"), an owner of motion picture theatres in Baltimore, Maryland, for the exhibition of the film at the 7 East Theatre in Baltimore (E. 502-503).[1] Pursuant to national distribution policy which Grove had adopted, and which it had represented to the United States Court of Appeals, the agreement provided that admission would be limited to persons 18 years of age and older (E. 503). The same representation was made to the Circuit Court for Baltimore City in this case (E. 503-504).

The film was distributed nationally, and it first opened in New York City on March 10, 1969. As

[1] "E" denotes the Joint Record Extract filed in the Court of Appeals of Maryland, copies of which have been filed with the Clerk of this Court.

of July 1, 1969, the evidence showed, it had been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland.[2]

On July 1, 1969, Grove and West, reserving the right to challenge the constitutionality of the statutory requirements of prior submission,[3] made application to the Maryland State Board of Censors for a license for the exhibition of the film in Maryland. On July 8, 1969, the Board made an administrative determination that the film was obscene, disapproving the film and declining to issue the license (E. 10). With this determination as its jurisdictional requisite, the Board on July 11, 1969, petitioned the Circuit Court of Baltimore City, pursuant to Md. Code Ann., Art. 66A, § 19, for a judicial determination of the film's obscenity.

The petition was served upon appellants on Saturday, July 12, and on Tuesday, July 15, they filed a motion raising preliminary objection. The substance of the motion was that the prior judicial determination by the United States Court of Appeals for the Second Circuit operated to preclude further censorship proceedings based on the alleged obscenity of the

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[2] The film is currently being shown, or has already been shown, in the cities listed in Appendix I, p. 90a *infra*, and contracts have also been executed with exhibitors for showing in more than 50 additional cities, see also Appellants' Ex. 22. Current figures indicate that as of mid-November 1969, the film has been exhibited to more than 2,500,000 people in the U. S.

[3] Of the four States which were noted in *Freedman* v. *Maryland*, 380 U.S. 51, 59 n.5 (1965), as having motion picture censorship statutes, only Maryland still enforces a censorship law applicable to adults.

film (E. 11). On that same date appellants filed interrogatories requesting the Board to "[s]tate the names and addresses of all experts who were consulted by the Maryland State Board of Censors in connection with its review of the application for a license for the showing of the film," and to "[i]dentify which, if any, of the persons named in the answer to the preceding Interrogatory advised the Board that the dominant theme of the film taken as a whole is not an appeal to a prurient interest in sex or that the film is not utterly without redeeming social value" (E. 14-15).

The hearing began on July 16, 1969. In response to the request for interrogatories, counsel for the Board declared, "I am not prepared to state one way or the other whether there were experts who saw the film who advised the Board as [appellants' counsel] suggested they might have been advised." (E. 26) He also argued that the Board does not conduct normal "administrative proceedings," and that "we don't believe that it is up to us to give any aid and comfort to the defendant in this case to try to help him prove what he would like to prove, which I don't believe he is going to be able to prove, and we resist the motion" (E. 27). The trial judge initially reserved ruling on the requested interrogatories, and subsequently denied the request (E. 243). *Inter alia*, the court also denied the motion based upon the decision of the Court of Appeals for the Second Circuit on the ground that the courts of Maryland are not bound by a decision of a federal court of appeals and "there is no difference between the first and any other amendment in that respect" (E. 29-30).

The court then viewed the film[4] and heard the testimony of four witnesses for the State (E. 31-242).[5] Eight witnesses, including several heads of departments at institutions of higher learning, testified for the appellants.[6] The appellants also introduced reviews of the film from national magazines and newspapers of wide circulation (E. 244-553; E. 319, 553).[7]

On July 31, 1969, the Circuit Court for Baltimore City, after viewing the film a second time, entered a Memorandum Opinion and Order disapproving the film for licensing under the statute (E. 1-11). The Court noted that it "was impressed by the testimony of one witness, at least as I interpreted it, who testified that, in his opinion, this is a serious film strongly put together, confusing to some, but that it would not hold together without the sex scenes" (E. 8). The court then rejected the testimony of appellants' expert witnesses "and their explanations of the reasons for the various objectionable scenes" (E. 9) and found that the film was obscene under the three-pronged test of *Memoirs v. Attorney General*, 383 U.S. 413 (1966).

On appeal, the Court of Appeals of Maryland affirmed by a division of 4-to-3. The majority opinion, apparently giving special weight to "the visual impact of a motion picture as contrasted with the printed

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[4] A brief description of the film, which was submitted to the Court of Appeals of Maryland as an appendix to appellants' brief appears as Appendix F, pp. 66a-69a *infra*.

[5] The testimony of the States' witnesses is summarized in Appendix G, pp. 70a-79a *infra*.

[6] The testimony of the defense witnesses is summarized in Appendix H, pp. 80a-89a *infra*.

[7] The reviews follow page E. 567 of the Joint Record Extract.

word" (p. 8a *infra*), concluded that "the overriding theme is sex per se" (p. 6a *infra*) and "that its dominant theme, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters" (p. 9a *infra*). The majority concluded that the film was "utterly without redeeming social value" because "the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived" (p. 9a *infra*). The majority also rejected the contention that the decision of the Court of Appeals for the Second Circuit foreclosed obscenity proceedings by the State on the ground that "only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us" (p. 13a *infra*).

Chief Judge Hammond and Judges McWilliams and Singley dissented in an opinion by Judge McWilliams which summarized the expert testimony offered in support of appellants' position as "an impressive array of witnesses . . . [including some] who . . . are considered to be the foremost authorities in this State on the motion picture. . . ." (p. 30a *infra*). The dissenters concluded that their views, and the views of serious movie reviewers "reflect at least a modicum of social value" (p. 31a *infra*), and they agreed with the opinions of Judges Hays and Friendly of the Court of Appeals for the Second Circuit that the film's social and sexual themes are interrelated.

THE QUESTIONS ARE SUBSTANTIAL

1. *The conflict of decisions.* The decision of the majority of the court below is in square conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (1968), in which two judges held that the same film could not be classified as obscene under the First Amendment because it could not be characterized as utterly without redeeming social importance. Review in this Court was not sought by the United States, and the decision of the Court of Appeals for the Second Circuit therefore binds the federal government for all purposes. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402-403 (1940); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F.2d 821 (S.D.N.Y. 1931). The contrary decision of the court below, if permitted to stand, would result in inconsistent treatment of the same film in federal and State courts within Maryland, as well as inconsistent treatment of the film among various jurisdictions.

"I Am Curious—Yellow" is presently the subject of litigation testing its alleged obscenity and/or the rights of its distributor and exhibitors to show it in twenty-three cases in thirteen different state jurisdictions.[8] The conflicting decisions of the United States Court of Appeals for the Second Circuit and the Court of Appeals of Maryland (as well as other inferior courts[9])

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[8] See Appendix E, pp. 63a-65a, *infra*.

[9] See, e.g., Commonwealth of Massachusetts v. Sotirios Karalexis et al.; State of Kansas v. Motion Picture Entitled "I Am Curious—Yellow," et al.; State of Washington v. National General Theatres, Inc., Grove Press, Inc. v. Robert B. Blackwell, et al., *infra*, pp. 63a-65a, Appendix E.

have, in these and many other jurisdictions, caused substantial deprivations of liberty and property, stimulated criminal and civil litigation, encouraged prosecutorial harassment and police intimidation of responsible theatre owners and their employees, and generated inconsistent administration of the law—all of which substantially impede the distribution and exhibition of the film, and result in immeasurable financial harm and other irreparable injury to these appellants, other motion picture exhibitors, and the adult film audience.

2. *The film is plainly not obscene.* The majority of the court below has prohibited the exhibition in Maryland of a Swedish motion picture, which already has been shown in over 50 cities in 25 states and the District of Columbia,[10] a film characterized by the trial judge as "a serious film strongly put together," on account of several "love scenes" which, the majority recognizes, are at times "introduced with some grace," and which comprise between six and ten minutes of the two-hour film. On the basis of its "independent" evaluation of these episodes and the remainder of the film—described by the majority below as "two story lines which strive to merge toward the end of the film, but never quite make it"—the majority below made the three findings deemed requisite for a conclusion that a work of literature or art is obscene in the constitutional sense. *See Memoirs v. Attorney General*, 383 U.S. 413, 418 (1966). The fundamental errors of the court below emerge from even a cursory examination of the

[10] See Appendix I, p. 90a *infra*.

film, the serious commentary and reviews it received,[11] and the expert testimony introduced at trial.

We submit that the misapplication by the majority below of the binding decisions of this Court in this area is plain enough that, upon the Court's examination of the opinions below, the film and the expert testimony, it would be appropriate for this Court to follow the procedure used in a number of recent cases involving proceedings against allegedly obscene matter, reversing the judgment below summarily on the authority of *Redrup v. New York*, 386 U.S. 767 (1967). See *Kuney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Shepard v. New York*, 388 U.S. 444 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Rascoblom v. Virginia*, 388 U.S. 450 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. Tennessee ex. rel. Canale*, 389 U.S. 578

[11] For example, its social, moral and artistic importance was described at the customs trial in New York by Yale University Professor of Drama and *New Republic* film critic Stanley Kauffmann, *Newsweek* Film Critic Paul Zimmerman, *New Leader* and *Hudson Review* film critic John Simon, *Saturday Review* film critic Hollis Alpert, N.Y.U. Professor of Film James Beveridge, sociologists Ned Polsky and Charles Winnick, psychiatrists Edward Hornick and Tom Levin, and others.

(1968); *Felton v. City of Pensacola*, 389 U.S. 1098 (1968); *Henry v. Louisiana*, 392 U.S. 655 (1968).[12]

a. The majority below plainly misapplied the standards of *Roth v. United States*, 354 U.S. 476 (1957), *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and *Memoirs v. Attorney General*, 383 U.S. 413 (1966). The *Roth* case stressed that "sex and obscenity are not synonymous" and required that the material alleged to be obscene be "taken as a whole" in determining whether its "dominant appeal" was to a prurient interest in sex. The majority below violated these tenets by baldly asserting that "the overriding theme is sex per se." That conclusion is refuted by (1) the majority's own finding that the film has "two story lines which strive to merge," (2) the fact that less than ten per cent of the

[12] A comparison of "I Am Curious—Yellow" with the materials found by this Court to be constitutionally protected in the above cases can leave no real room for the doubt that the film in issue here far outdistances, in terms of social importance, the matters at issue in the cited cases. The decisions involving films were *Ratner* ("Honey Bee"), *Gilbert* ("Jayne Palmer No. 2," "Jayne Tracy"), *I. M. Amusement Co.* ("Beautease Models"), *Robert Arthur Management Corp.* ("Mondo Freudo"), and *Schackman* ("peepshow" films). The remainder related either to magazines of the "girlie" or "nudist" variety—*Rosenbloom* ("Solis" and other nudist magazines), *Potomac News* ("Hellenic Sun No. II"), *Conner* ("Escapade," "Nude," "Rogue", etc.), *Henry* ("Gent," "Caper," etc.) and *Felton* ("magazines of the nudist variety") —paperback books with sexual themes *Keller* ("Sin Servant," "Lust School," "Lust Web"), *Coviglh Publications* ("Sin Whisper" and "bondage" material *Friedman, Shepard* and *Ingraham*. The dominant themes of burlesque films and nudist or girlie magazines might far more cogently be characterized as appeals to the prurient interest in sex than the theme of "I Am Curious—Yellow." A comparison of the exhibits alone compels a finding that reversal here follows *a fortiori* from the reversals following *Redrup*.

film's footage is devoted to the "story line" containing the "sexual scenes," (3) the reviews of the film received in evidence below, (4) the expert opinions to the contrary given by the only witnesses on film history and film technique who testified in this case,[13] (5) the

[13] The dissenting opinion summarized the expert testimony as follows:

Dr. Richard A. Macksey, Acting Director of the Humanities Center of the Johns Hopkins University, stated that he has taught more than a dozen different courses about films and film making and that he is a member of the Board of the Maryland Film Festival. He said the film is "concerned clearly with * * * conflicts between generations," "the doctrine of non-violence as this relates to Sweden's particular role in Europe" and with "the kind of malaise of the so-called welfare state in Sweden, the ostensibly classless society." The film, he continued, covered "a wide range of social attitudes" and had "artistic merit."

Dr. Lincoln F. Johnson, Chairman of the Fine Arts Department of Goucher College, has studied motion pictures seriously for 18 years and he regularly teaches courses in the history of motion pictures and film productions. He has served also on the selection body for the American Film Festival and he views "between 100 and 150" commercial films a year. He testified that the film has "cultural significance" and "cinematic merit."

Dr. Peter H. Rossi, a sociologist, is Chairman of the Department of Social Relations of the Johns Hopkins University. He has held editorial positions on three sociological journals and he has been a consultant to the Commission on Pornography and other national commissions as well. He testified that the film has "social significance" inasmuch as it is descriptive of the criticism by young people throughout the world of the present form of society. As Dr. Rossi put it:

> "Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but is critical of the Chinese, the Russians and the like. It is not a very articulated message. It is a film which says there is something wrong and it is a film which says also that young people like the heroine are searching for

testimony of thirteen experts who testified in the Southern District of New York as reported in the majority opinion of the United States Court of Appeals for the

> a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives."

Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland (Baltimore campus), has made a serious study of the theater arts. He testified that the film has "artistic merit" inasmuch as it made "a good try at some interesting forms, using a number of different frameworks and a number of themes; trying to do a number of things at the same time."

Dr. Ronald H. Paulson is professor of English and Chairman of the English Department of the Johns Hopkins University. Dr. Paulson stated that he views, on the average, two films a week and that he has published works on literary criticism. He further testified that "* * * this is a film with * * * artistic esthetic merit. It holds together; it is relatively coherent, judged by the very best movies; it is dealing with an important subject. * * * [the] breakdown in the relationship between the symbols of authority and the people, between parents and children." Moreover, he stated that the film has social merit "in the sense that it is dealing with important social problems."

Paroonir Stephany is Chairman of the Department of Photography and Films at the Maryland Institute and he teaches courses in film making and film history. Additionally, he has been Chairman of the Maryland Film Festival and he has appeared in court on three occasions to testify for the Board of Censors. He testified that the film has artistic merit and he offered the further comment that "[i]t is rather strongly put together" and "is certainly one of the outstanding films made within the last year."

The testimony of the State's witnesses was less impressive. Reuben Kramer testified that the movie was "totally inartistic" inasmuch as the sex scenes "contaminated the picture." He conceded that he does not regularly attend the movies and has no expertise in the "cinematographic art medium." Furthermore, he stated that in his opinion very few films have any artistic merit and "are just stupid." However, he indicated that this film "is not stupid."

William Forshaw, Senior Subjects Specialist in the Humanities Department of the Pratt Library testified that he is "interested in the preservation of American film" and is a film consultant and historian to the Baltimore Museum of Art. He stated that in his

Second Circuit in its evaluation of the same film (p. 49a *infra*), and (6) the conclusion of that court that "[w]hatever the dominant theme may be said to be . . . it is certainly not sex . . . not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as 'prurient'" (p. 52a *infra*).

b. Even more blatant is the misapplication of the *Jacobellis* and *Memoirs* standard that "a work cannot be proscribed unless it is utterly without social importance." This appears not only from an independent viewing of the film, but from the opinions of the trial judge and the appellate court. For example, the trial judge noted he was "impressed by the testimony of one witness . . . who testified that, in his opinion, this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes" (E. 8). Similarly, the majority below found "that there are times when the love scenes are introduced with some grace" (p. 6a *infra*), and that the film included "attempts . . . to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience [sic]"—although it characterized the latter as "strained and con-

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opinion, which he described as a minority one among his colleagues, the film had no social or literary merit.

Dr. Paul Yaffe is employed by the Baltimore City Schools as Director of the Educational Testing Service. He is also a part-time practicing psychologist with "more than average ability in the area of projective techniques." He emphasized that he did "not pose as an expert of films, either from experience or study." Dr. Yaffe testified that in his opinion the film "pretended" to have socially redeeming value. He pointed out that "the socially meaningful situation is * * * shallow and if the film were to stand on it alone it could have no real redeeming features in the sense that it would be instructional or would clarify situations, and the like."

trived" (p. 9a *infra*). These findings in themselves compel reversal for they concede to "I Am Curious Yellow" as much in the way of "a modicum of social value" (383 U.S. at 420) as the "skill in characterization and . . . gift for comedy" which provided the basis for constitutional protection of John Cleland's *Fanny Hill* in the *Memoirs* case. As was noted in *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Brennan and Goldberg, JJ.), "material dealing with sex in a manner that . . . has literary or scientific or artistic value . . . may not be branded as obscene and denied the constitutional protection." The finding of the majority below that there was a "contrived" relation between the sexual material and the rest of the film involved the court in an artistic judgment which was in direct conflict with the testimonial judgment of foremost authorities on the motion picture, (as well as the State's own literary expert).[14] The contrary conclusion of a majority of the Court of Appeals for the Second Circuit, of all thirteen experts who had testified in the Customs case and of a substantial minority of the court below is also supported by the views of nationally-known movie critics and by the many indications in the record below of the film's concern with the expression of ideas.

3. *The unconstitutional statute.* The Maryland censorship statute is unconstitutional on its face because it exceeds the limitations prescribed by this Court for a licensing statute in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Teitel Film Corp.* v. *Cusack*, 390 U.S.

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[14] A librarian at the Enoch Pratt Free Library in Baltimore, testified in response to the court's questions that the "political" or "social" story could *not* have been told "without these sexual scenes" (E. 241-242).

139 (1968), grants to the Board of Censors an overbroad and unconstitutional standard by which to disapprove films, and absolutely prevents the circulation even of non obscene films under penalty of fine and/or imprisonment.

a. Subsequent to *Freedman* v. *Maryland*, *supra*, the Maryland Legislature amended Section 19 of the censorship law to add a jail sentence to the penalties provided for non submission of a film and prescribe fixed periods of time in which the Board of Censors and a trial court must act so as to invoke the processes and sanctions of the law. In *Trans Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965), the Maryland Court of Appeals held that this latter amendment fully satisfied the constitutional requirements of *Freedman*.

In *Trans-Lux*, the State court overlooked the fact that the amended statute sets no time limitation upon disposition of an appeal by the Maryland Court of Appeals. Hence the requirement of a "prompt, *final* judicial decision," prescribed in *Freedman* (380 U.S. at 59), is omitted from the Maryland procedure. The chronology of this case—in which (one month already having elapsed between the dates of submission and the lower court determination) more than six weeks elapsed between the dates on which the case was argued in the Maryland Court of Appeals and its disposition—demonstrates the type of delay which this omission generates and which the Court in *Freedman* correctly viewed would have a "potentially chilling effect . . . on protected expression," 380 U.S. at 61. In *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968), the Court concluded that a system allowing a possible delay of 50 to 57 days prior to judicial proceedings was consti-

tutionally defective; the same must be held as to a system which permits a comparable time period to elapse between oral argument of an appeal and a decision in the case, especially if it can operate, as here, to prevent exhibition of a film previously declared to be non-obscene by a federal circuit court of appeals.

b. Moreover, Section 6(a)(b) of the statute—the only definitional subsection which the Court of Appeals of Maryland has upheld against constitutional challenge[15]—grants the Board of Censors the authority to disapprove a film as "obscene" if "when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." It is plain that this is not the constitutional standard for obscenity defined by this Court in *Memoirs* v. *Attorney General*, 383 U.S. 413, 418 (1966), in that it omits two of the three elements specified in the *Memoirs* opinion. Moreover, Section 6 incorporates the legal standard which was expressly disapproved in the *Memoirs* decision. It directs the Board of Censors to determine whether the "probability" of the sexual effect of a film "is so great as to outweigh whatever other merits the film may possess." This standard is contrary to the principle that "[e]ach of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness." 383 U.S. at 419.

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[15] See *Dunn* v. *Maryland State Board of Censors*, 240 and 249, 213 A.2d 751 (1965); *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967).

A system of prior restraint of motion pictures cannot be permitted to stand where the statutory criterion is so very much broader than what the Constitution allows. For in such a case there is no way of knowing whether the Board of Censors, which is the initial principal body vested with authority, is applying the constitutionally impermissible standard set out in the statute or the narrower definition of obscenity prescribed in the decisions of this Court and necessarily followed by the State courts.

The governing constitutional principle is the one applied by this Court in *NAACP* v. *Button*, 371 U.S. 415, 432-433 (1963): "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the dangers of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." In this case, as in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964), the statute is unconstitutional on its face because it "sweeps too widely and too indiscriminately across" a constitutionally protected liberty. And here, as in *Aptheker* (378 U.S. at 515-517), the statute cannot be saved by narrowing judicial construction or by testing its application to the particular facts of each case. The "plain words" of Section 6 are clear, and the statute—like those in *NAACP* v. *Button*, *supra* and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)—impinges upon free speech and must therefore be judged as written, and not as judicially revised. That is the teaching of this Court's decision in *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968), where with respect to a vague film classification ordinance, this Court said, "The vice of

vagueness is particularly pronounced where expression is sought to be subject to licensing." 390 U.S. at 683.

c. The amended Maryland system is also defective because it subjects to summary criminal punishment persons alike who seek to exhibit non-obscene or obscene films, making no allowance for a refusal to submit to an extended process of previous restraint films believed by their exhibitors to be constitutionally protected and non-obscene, even as here where the belief is supported by a direct adjudication of that question by a high federal bench. In thus precluding a person from circulating material not yet found obscene or already found not-obscene, in a judicial proceeding—"subject only to later contempt proceedings—if the materials are obscene,"[16] the principles laid down by this Court in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957) are violated. The Maryland system erects an unconstitutional prior restraint because it can be applied as effectively to banish from the motion picture screens everywhere in Maryland not only "concededly obscene films," but assuredly protected, non-obscene films.

4. *The multiple local actions.*—The constitutionality of multiple State and local obscenity proceedings against literary or artistic matter which has been judicially determined, in an action binding on the United States, to be constitutionally protected is a substantial question which should be resolved by this Court. In *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the Court noted that with respect to the "delicate and vulnerable" freedoms of speech and association, "[t]he threat of sanctions may deter their exercise almost as potently

[16] See "Free Speech And Obscenity: A Search For Constitutional Procedures and Standards", 12 U.C.L.A. Law Rev. 532, 536 (1966).

as the actual application of sanctions." See also *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487 (1965). And in *Smith* v. *California*, 361 U.S. 147, 153-154 (1960), the principle that *scienter* was a constitutionally necessary element of a criminal prosecution against a vendor of obscenity was based on the proposition that any other rule would result in the restriction, by a bookseller's self-limitation, upon the distribution of constitutionally protected matter. The same reasoning was applied by this Court in striking down a vague film classification ordinance in *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 683-684 (1968), and an unduly burdensome scheme of film licensing in *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965). In each of these instances the Court was concerned with the discouraging effect that the challenged procedures could have upon distributors and exhibitors of constitutionally protected matter which might be subjected to "a protracted and onerous course of litigation." 380 U.S. at 59.

The same repressive effect on the exercise of First Amendment rights results if States and local jurisdictions are permitted to institute and maintain multiple proceedings, such as this one, against a film which has been conclusively and finally determined to be constitutionally protected, as the result of adversary litigation to which the United States is a party in a federal court.[17] The motion picture which is the subject of this case has been the subject of such harrassment, notwithstanding the searching analysis and reasoned final

[17] Such action appears also, under the principle of *Edwards* v. *California*, 314 U.S. 160 (1941), to create an unconstitutional burden on interstate commerce. Once admitted entry into the United States, a film should be free at least to enter any State, even assuming *arguendo* that the State retains some police power to bring criminal actions on account of the manner or circumstances of its local distribution, as suggested in *Redrup*.

rejection of the allegation of obscenity made by the Court of Appeals for the Second Circuit. The First and Fourteenth Amendments do not countenance multiple proceedings of this kind, with varying results as to the freedom of a film across state and county lines, and which disrupt and prevent the nationwide distribution of constitutionally protected motion pictures. See *Jacobellis* v. *Ohio*, 378 U.S. 484 (1964); *In re Giannini*, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968).

5. *Rights of willing adult viewers*—It is abundantly clear from the record in this case that the circumstances under which the film is to be exhibited by the appellants are such that there is no "assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967). Only adults[18] who voluntarily elect to see the film will view it, and they are free to leave the theatre at any time if it does not meet their expectations.[19] Accordingly, this case presents the question whether the First and Fourteenth Amendments, as applied recently in

[18] Grove's contract with West requires that entry be denied to children (E. 503). Hence there is no basis on which to assert the State's "specific and limited concern for juveniles." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967). Compare *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

[19] There is not a scintilla of evidence in the record to support any conclusion that the "pandering" doctrine of *Ginzburg* v. *United States*, 383 U.S. 463 (1966), is applicable. The concurring judge's opinion (pp. 13a-26a, *infra*) is based on (1) strained inferences drawn from the quantity of photographs in the published scenario of the film and (2) the conclusions of a Kansas trial court on a different record involving different parties which was not even adverted to in this case. Moreover, there is no support in the *Ginzburg* opinion—and none, we submit, in the rationale of that decision, for the astounding proposition that prior restraint may be imposed on a film on the basis of a fear or prediction of *potential* "pandering."

Stanley v. Georgia, 394 U.S. 557 (1969), permit a State to prevent adults who wish to view an allegedly obscene film from fulfilling that wish in a privately owned theatre to which admission is restricted. We submit that there is no rational distinction between the right of a person "to satisfy his intellectual and emotional needs in the privacy of his own home" (*Stanley v. Georgia*, 394 U.S. 557, 565 (1969)) and his right to satisfy those needs in the privacy of a movie theatre whose owner is ready and willing to accommodate him and which is open to all who seek such satisfaction without intruding on the privacy or sensitivities of those who would be offended by it.[20] A three-judge federal bench in Massachusetts has now agreed with this proposition, and considered unconstitutional under *Stanley* a Massachusetts law in connection with a state proceeding in which an exhibitor of the instant film "I Am Curious-Yellow" was prosecuted, convicted, and sentenced to a one-year term of imprisonment. (The court's opinion by Circuit Judge Aldrich, is set out in Appendix K, pp. 103a-119a *infra*, together with the dissenting opinion of District Judge Julian.)

The "nuisance" theory of obscenity—which has long been espoused by scholars[21]—is supported by an anal-

[20] In this respect, this case is the converse of *Rowan v. United States*, No. 329, this Term, in which the Court noted probable jurisdiction on October 28, 1969. The statute at issue in *Rowan* has the effect of authorizing those who are offended by allegedly obscene material to terminate its delivery to them. This case involves the right of *willing* recipients and views to satisfy their wants.

[21] See, *e.g.*, Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 393 (1963); Packer the Limits of the Criminal Sanction 324 (1968); Moreale, *An Analysis and Statutory Proposal*, 1969 Wisc. L. Rev. 42. See also the discussion of Stanley v. Georgia in *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 147-154 (1969).

xsis of this Court's decisions in the area of obscenity and other "offensive" speech from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942), *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1952), and *Winters* v. *New York*, 333 U.S. 507, 515 (1949) to *Redrup* v. *New York*, 386 U.S. 767 (1967), and *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Under that theory, the judgment below cannot stand.

6. *Suppression of favorable leads.* The denial by the Circuit Court judge of the appellants' request for the names of the experts who had been consulted by the Board of Censors violated the appellants' constitutional rights in that it withheld from the appellants information concerning testimony likely to be favorable to the appellants but known only to the State's attorney. See *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967). Reports of expert witnesses are covered by the *Brady* rule (*Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1967)), and they may not be knowingly withheld from the defense.

The fact that this was not nominally a criminal proceeding is no answer to this contention. In the first place, a failure to submit to the proceedings can result in a criminal conviction of the exhibitor. Moreover, it is entirely clear that the effect of the trial court's disapproval was the same as a forfeiture of the film in that it precluded its use and exhibition within the State. Forfeiture proceedings are, of course, "quasi-criminal in character" (*Boyd* v. *United States*, 116 U.S. 616 (1886); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965)), and the safeguards applicable in criminal proceedings are constitutionally mandatory here as well.

In addition, the conclusions of the Board of Censors are constitutionally invalid because they are based on no administrative record and on no specific evidence whatever. All the record contains is the bare conclusion of the Board, and there is, therefore, no opportunity for a meaningful determination as to whether it carried out its statutory responsibility. This Court's ruling in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), was surely not intended to give the Board of Censors so wide a range in which to roam. If the fixing of precise standards for an administrative system of prior restraint is to have any meaning at all, it must at least require the censor to keep a record which will demonstrate that the constitutional and statutory standards have been met.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1969.

No. 212

HOWARD WAGONHEIM, Agent; GROVE PRESS, INC.; 5 WEST AMUSEMENT CO., INC.

v.

MARYLAND STATE BOARD OF CENSORS

Hammond, C.J.
Marbury
Barnes
McWilliams
Finan
Singley
Smith,
JJ.

Opinion by Finan, J., Barnes, J., Concurs. Hammond, C.J., McWilliams and Singley, J.J., Dissent.

Filed: October 22, 1969

This is an appeal from an order of the Circuit Court of Baltimore City (Carter, J.) directing that the motion picture film entitled, "I Am Curious (Yellow)" be disapproved for licensing as being in violation of the provisions of Code (1957), Art. 66A, § 6, in that the film

"meets the tests of obscenity previously laid down by the Courts * * *."[1]

The primary issue before this Court is whether this film is protected matter under the First Amendment of the United States Constitution. We think not and accordingly affirm the action of the lower court.

This film was produced by Sandrew, a Swedish studio, and was directed by Vilgot Sjoman, a protégé of Ingmar Bergman. Its producers would claim that it represents a kaleidoscopic portrait of Sweden, portraying problems and trends on the contemporary social and political scene. An effort has been made to develop the film along two story

[1] On July 11, 1969, the Maryland State Board of Censors filed a petition pursuant to Section 19 of Article 66A of the Annotated Code of Maryland (1967 Replacement Volume) for judicial determination as to whether a certain motion picture titled "I Am Curious (Yellow)" is entitled to be exhibited within the State of Maryland considering the provisions of Section 6 of Article 66A of the said Code. This film was submitted to the Board for examination and licensing on July 1, 1969, by the applicant, Howard Wagonheim and Grove Press, Inc., "manufacturer." The Board viewed the film on July 8, 1969, disapproved it under the provisions of Section 6 of Article 66A of the Code. The Order of disapproval read as follows:

> "After reviewing the entire film, and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex, that it deals purposely and effectively with sex in a manner which appeals to the prurient interest that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive."

The lower court viewed the film and listened to the testimony of witnesses for approximately two weeks and reviewed the film a second time prior to rendering its opinion. The film was viewed by this Court as required by Art. 66A, § 19(a) on September 8, 1969, prior to hearing argument by counsel representing the appellants, Howard Wagonheim, Agent; Grove Press, Inc.; 5 West Amusement Co., Inc., and the appellee, Maryland State Board of Censors.

lines which strive to merge toward the end of the film, but never quite make it. The total effect is that the whole presents more of a framework than a plot.[2] The film was the subject of a decision by the United States Court of Appeals for the Second Circuit in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2nd 196 (1968). The court in a two to one decision found it to be constitutionally protected. Judge Hays, in writing the majority opinion, made the apt comment that: "As with many other contemporary artistic productions there can be a difference of opinion as to what the picture is 'about'." *Id.* at 198. Various critics and experts who have written and testified concerning the film characterize it as a quest for identity with reality, on the part of the young heroine, amidst the shifting sands of social, moral, political, economic, and cultural transition. Her search for identity has been billed as representative of the younger generation in Sweden, their hope for a classless society, their adherence to non-violence, and their demonstrable hostility against the Franco-type totalitarian state.

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[2] The main characters in the film are "Lena," a young drama student, "Borje," a young actor, and "Vilgot," the director. The three are making a film together. In making the film Lena, having become interested in Borje, finally leaves the director, to whose apartment she has ready access, to take up with Borje. In the meantime the film gradually reveals her life as a young girl who lives with her frustrated father in a picture frame shop. Lena is disillusioned with her father, who in his idealistic youth went to fight in the civil war in Spain and who became frightened and fled. Lena endeavors to convey the impression that she is carrying on the protest which her father gave up and much of the film shows her scurrying about Sweden interviewing people about political and ethical attitudes. She pickets and protests some of the political and social situations, seeks sexual freedom of a sort enjoyed by men, and in one sequence rebels violently against Borje, who conceals from her his love life with other women. In a dream fantasy she shoots him and then castrates him. All of this is put together in collage form.

The film in reaching for its social message employs the "man on the street" interview format, with Lena accosting persons from all walks of life, questioning them about their social and political beliefs. However, when the viewer ultimately realizes that the sexual scenes have little or nothing to do with what was developed by the "cinema verite" technique, not only do the sexual sequences appear artifically interjected into the film, but in retrospect, the many interviews seem a contrived ruse to give the movie social value. As one of the expert witnesses called by the State, Dr. Paul Yaffe, tersely put it: "Basically you have two themes running parallel, one never touching the other. Basically, one is this phony setting of class values and class structures and class problems. The other is the sexual activity of an episodic nature."

The matter of the plot was also the subject of comment by Chief Judge Lumbard in his dissent in the Second Circuit opinion wherein he stated: "The sexual aspect of the film does not arise from the plot, *as that is non existent* (emphasis supplied); it arises from the decision by the director, Vilgot Sjoman, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public." *Id.* at 203.

There are several brief interviews with the late Dr. Martin Luther King, wherein he comments on his non-violent methods, and with the Russian poet Yevgeny Yevtushenko. However, these appear to be part of a facade for the main objective of the picture, namely to purvey shocking and titillating sexual sequences. As Judge Friendly stated in his concurring opinion in the Second Circuit "* * * a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms." *Id.* at 201.

Again, quoting from Judge Hays in the Second Circuit opinion:

> "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts." *Id.* at 198.

Actually, the film vividly depicts six different acts of sexual intercourse in various positions and locales. Among the more unusual scenes is an episode of copulation in the crook of a tree; a second occurs on the balustrade of the royal palace in Stockholm in rhythm to the Swedish national anthem, while a distraught sentry endeavors to stand at attention as he views the efforts of the two out of the corner of his eye. This is considered one of the humorous episodes of the film. There are a number of scenes depicting complete nudity of the male and female leads, including numerous views of both the female and male genitals. There are representation of fellatio and cunnilingus, as well as the suggestion of sodomy in one of the intercourse scenes, and of castration in the fantasy scene.

The dialogue is entirely in Swedish with English subtitles. The English translation of the Swedish dialogue, as contained in the scenario which was filed as an exhibit, reveals that the translation in many instances goes beyond that contained in the English subtitles from the standpoint of use of lascivious expression.[3]

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[3] The Attorney General in his brief for the appellee lists the following instances of uncommon sex in the movie: (1) Lena's singing "In Rio de Janeiro you can fuck for free"; (2) the display of erotic Indian sculpture depicting a man with his hand on a woman's vagina; (3) the discussion between Lena and another girl about different methods of masturbation; (4) Lena's dialogue, "Are you that fucking

In fairness to the film it should be stated that there are times when the love scenes are introduced with some grace and a discussion of them in an opinion might tend to represent them too crudely out of context. However, the overriding theme is sex per se, although perhaps not presented with the abruptness as might appear from the written word.

This Court in *Hewitt* v. *Maryland State Board of Censors*, 254 Md. 179; 254 A.2d 203 (1969), a case in which the

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stupid?"; (5) detailed love making scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Borje caressing the girl's breasts with his tongue; (6) scene depicting sexual intercourse between Borje and Lena on the palace balustrade in which, although the parties are clothed, the act of intercourse is vividly displayed; (8) scenes of nudity at the retreat and scene depicting Lena looking at a sex manual showing various unusual positions for sexual intercourse; (9) scene at the retreat showing Borje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena kissing Borje's penis as he caresses her vagina; (10) a discussion regarding sex which "makes them both horny"; (11) scene depicting intercourse in the water; (12) scene depicting sexual intercourse in a tree between Lena and Borje; (13) scene showing fully the naked bodies of the two lying on the floor engaged in either sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation; (14) followed by a scene fully showing Borje's genitals, followed by a scene in which the nude Borje chases the nude Lena from one room to another, throws her to the floor and mounts her in a position of sexual intercourse. They then are shown with loins entangled, copulating on the floor; (15) fantasy scene in which Lena shoots Borje and castrates him with a knife; (16) Lena's dialogue: "He's a big fucking shit and I'll kill him when I get hold of him. I'll cut off his cock"; (17) nudity at the clinic with again an emphasis on the genital area of the male and female."

film "Odd Tastes" was disapproved for licensing, had occasion to again set forth the legal test for obscene films. Judge Barnes writing the opinion for the Court stated:

> "Our definition of obscenity—the *Roth-Alberts* test—was restated with somewhat different emphasis perhaps, by the Supreme Court in *A Book Named 'John Cleland's Memoirs of A Woman of Pleasure' v. Attorney General*, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1, 5-6 (1966), hereinafter referred to as *Memoirs*, in which Mr. Justice Brennan, for the Supreme Court, stated:
>
> > 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'
>
> "We recognized and applied this latest statement of the applicable rule in *Samza v. Maryland State Board of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320-21 (1967), in which we sustained the Circuit Court and the Board in their finding that certain films, shown in an arcade in 'the Block' in Baltimore, were obscene. * * *." *Id.* at 182-83.

See also *Redrup v. New York*, 386 U.S. 767, 770, 771 (1967).

Applying the tridentated test of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966), as adopted by this Court in *Heueitt, supra, and Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967), and set forth above, we find the film qualifies as obscene under all three categories. In arriving at this conclusion we cannot ignore the visual impact of a motion picture as contrasted with the printed word. *I Am Curious-Yellow, supra* (Lumbard, J., dissenting); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). Cf. *Landau* v. *Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456 (1967).

It should be noted that this is not a case wherein we are bound to follow the ruling of the lower court unless we find it to be clearly erroneous (Maryland Rule 886 a), but rather the duty of this Court is to make an independent constitutional judgment on a mixed question of law and fact, as to whether the subject matter before us is obscene. This obligation was cogently expressed by Judge Oppenheimer, writing the opinion of this Court in *Sanza, supra*, wherein he stated:

> "In determining whether the films are obscene, we are deeply mindful of our obligation to make an independent constitutional judgment on the facts of the case, *Jacobellis, supra*, at 378 U.S. 190, and that the administration of a censorship system for motion pictures presents peculiar challenges to constitutionally protected speech. *Freedman, supra, at* 380 U.S. 57. We are mindful too that "we are judges, not literary experts or historians or philosophers,' *Fanny Hill, supra*, concurring opinion of Mr. Justice Douglas at 383 U.S. 427, and that ordinarily neither the judge who may sit in the circuit court review the action of the Board nor the judges of this Court would be quali-

fied to determine whether a film fails to meet the three tests laid down in *Roth-Alberts* without enlightening testimony. *Dunn, supra,* 240 Md. at 255." *Id.* at 320.

In addition to viewing the film we have reviewed the testimony of the many experts contained in the record representing views, both pro and con, as to the social, artistic and cultural attributes of the film or the lack thereof. The witnesses for the petitioners, as well as the exhibitor, were individuals who possessed respected artistic, educational and cultural backgrounds in the Baltimore area. We see little need to repeat their opinions but want it known that we have considered them in reaching our conclusions.

This Court has little difficulty in finding that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters. It is only with regard to the third element of the "Roth-Alberts" test as set forth in *A Book* v. *Attorney General, supra,* which must coalesce with the other two standards, which presents any occasion for pause. However, after reviewing all of the evidence in a light most favorable to the appellants' contention that the film does have something of social value, it is our judgment that it is utterly without redeeming social value. We have previously, in this opinion, stated that the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived. We do not think that Lena's concern with social and political problems, so artificially depicted, supplies the redeeming social quality required to sustain the film. We find no meaningful nexus between this concern and her problem with her

twenty-three lovers. As was stated by Judge Lumbard in his dissent[1] in *I Am Curious, supra*:

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.
>
> "While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture." *Id.* at 203,

or as Judge Murphy, who presided in the United States District Court for the Southern District of New York at the trial of *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 285 F. Supp. 465 (1968) observed:

> "If the film has a message, whether it is public poll taking on the social structure of the Swedish

[1] On October 6, 1969, the United States District Court for the District of Kansas had before it the cases of Grove Press, Inc. v. Kansas and Lakeside Drive In Theatre, Inc. v. Menghini, et al. (Nos. KC-2992 and KC-2997), wherein the obscenity statutes of Kansas were challenged and injunctions were sought to enjoin proceedings pending in the District Courts of Johnson County and Wyandotte County, Kansas, and which proceedings concern the question of the application of the Kansas statutes to the film "I Am Curious (Yellow)." The Court found the statutes constitutional and did not reach the obscenity question. However, the Court stated that "All Judges on the present Court agree with Judge Lumbard's statement [dissent], but because we did not reach the question, we do not so hold."

> society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hardcore pornography." *Id.* at 472.

Finding nothing in this film that merits the protection of the First Amendment of the United States Constitution, we are of the opinion that it should be disapproved for licensing under Maryland Code, Article 66A, Section 6.

The appellants raised other issues of a technical nature which we shall proceed to discuss.

The appellants complain that at the hearing in the lower court, the trial judge refused to order the Attorney General's office to disclose the names of all the experts which they requested to view the film. An analogy is made to the situation where due process of law requires that the State, upon request, divulge all evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Barbee v. Warden*, 331 F.2d 842 (4th Cir., 1964); *United States v. Poole*, 379 F.2d 645 (7th Cir., 1967); *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

It is not disputed that the hearing before the lower court in censorship cases is of an adversary nature. In the instant case the appellants requested not only the names of the actual witnesses which the State proposed to use at the hearing, but all of the individuals who may have been requested by the State to view the film for the possible purpose of being used as a witness, or for consultation with the State concerning *the obscene aspects* of the film. We do not think that discovery in civil cases as promulgated by Maryland Rule 417 goes to that which is in essence the work product of the attorney accumulated in the preparation of the case. Furthermore, if it were to be contended that Maryland Rule 728 relating to discovery in criminal cases were applicable, we think the opinion of this Court in *Kardy v. Shook, J.*, 237 Md. 524,

540, 207 A.2d 83 (1965) dispositive of the issue, wherein Prescott, C.J., writing for the Court stated:

> "* * * And, in *Williams v. State*, 226 Md. 614, we held that where a demand for a bill of particulars went far beyond what was required under Rule 728 and was calculated, not so much to amplify the allegations of indictment, but 'to require complete disclosure by the State of the evidence it relied upon,' the court was justified in sustaining the State's exceptions to the demand." *Id.* at 540.

The appellants also attacked the constitutionality of the prior restraint procedure provided by the Maryland Statute (Art. 66A). We think these contentions were generally answered by this Court in *Trans Lux Distrib. Corp. v. State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965), which reviewed the Maryland Statute in light of its amendment by Chapter 598 of the Acts of 1965, which amendment had the effect of revising Section 19 of Article 66A to conform to the guidelines suggested by the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965).

The appellants further contend that the Board acted with insufficient evidence to sustain its refusal to license the film and that because of this the lower court lacked jurisdiction to enter an order disapproving the film. Without entering into a prolonged discussion, as to whether the administrative procedure followed by the Board is not subject to review where it is clear that there has been a *de novo* judicial determination, *Universal Film v. Chicago*, 288 F. Supp. 286 (1968), we think that the Board made a conscientious effort to follow the guidelines set forth in *Hewitt v. Board of Censors*, 243 Md. 574, 585, 586, 221 A.2d 894 (1966), and that there was sufficient expert testimony on which it could properly base its decision.

Finally, the appellants argue that the judgment of the United States Court of Appeals for the Second Circuit in

I Am Curious (Yellow), supra, is conclusive on the State's case, in that the federal statute under which adjudication was made must be read as preempting the right of a state later to subject the film to further restraint in advance of public showing. The short answer to this is that the United States Supreme Court in *Freedman* v. *Maryland, supra,* recognized that as long as a state follows the procedural safeguard suggested therein, it may validly exercise its police power to effectuate a censorship system. It is our belief that only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us. Constitution of Maryland, Declaration of Rights, Article 2.

In affirming the lower court's order disapproving the film "I Am Curious (Yellow)" for licensing on the basis that it is obscene, we are mindful of Justice Stewart's observation in *Ginzburg* v. *United States,* 383 U.S. 463, 498 (1966) that, "Censorship reflects a society's lack of confidence in itself"; yet, we are likewise sensate to our obligation to withhold the protection of the First Amendment from material which those who wrote the Constitution never intended to protect.

ORDER AFFIRMED, APPELLANTS TO PAY COSTS.

Barnes, J. concurring:

I entirely concur with the reasoning, statement of facts and application of the law in the opinion of the Court. I *am of the opinion,* however, that (a) additional emphasis should be given to the pandering aspect of the case when the third test of "utterly without redeeming social value" is considered and (b) there should be additional comment upon the scope or applicability of this third test when the Court has before it a motion picture which is obscene under the first two tests in regard to prurient interest in sex and an affront to contemporary community standards.

(a)

In the majority opinion, in considering the third test, the pandering aspect of the case is suggested by the observation that the film makers' attempt to raise so-called "social questions" was "patently strained and contrived" and the result was so "artificially depicted" as failing to supply the "redeeming social quality required to sustain the film." The majority opinion also cites with approval a portion of Chief Judge Lumbard's dissenting opinion in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196, 202, in which he states, "Needless to say these acts (of fellatio and cunnilingus) bear no conceivable relevance to any social value, except that of *box office appeal.*" (Emphasis supplied.) *Id.* at 203. With these observations, I heartily concur, but I would additionally emphasize that the record discloses to me that there is substantial evidence which indicates the pandering of sex. This pandering, in my opinion, brings the present case within the ambit of the decision of the Supreme Court of the United States in *Ginzburg* v. *United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

In *Ginzburg*, there was a clear majority of five justices for the opinion of the Court, *i.e.*, Mr. Justice Brennan, who wrote the majority opinion, with the concurrence of Warren, C.J., Clark, White and Fortas, J.J. Justices Black, Douglas, Harlan and Stewart dissented and each wrote dissenting opinions.

The opinion of the Supreme Court in *Ginzburg* stated:

> "This evidence (of advertising), in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving

intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (383 U.S. at 470, 86 S.Ct. at 947, 16 L.Ed.2d at 38)

We cited and followed *Ginzburg* in *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967) and recently in *Hewitt* v. *Maryland State Board of Censors*; 254 Md. 179, 193-95, 254 A.2d 203, 210-211 (1969), involving the motion picture "Odd Tastes."

The pandering of sex in the present case is not of the same nature as that involved in *Ginzburg* and the evidence in regard to it is not as clear and definite as was the evidence in *Hewitt*, *supra*. In the instant case the pandering aspect is more subtle, but it is present none the less.

In the scenario, which apparently is prepared for sale in conjunction with the motion picture, there is an obvious emphasis on the sexual aspects of the motion picture revealing as its object the "material gain for the creator through an appeal to the sexual curiosity and appetite."

Ginzburg, supra, 383 U.S. at 471, 86 S.Ct. at 947-948, 16 L.Ed.2d at 38. It is apparent from looking at the scenario that there is a larger proportion of photographs of the sexual scenes than in the motion picture and Dr. Macksey, an expert witness for the appellants, stated, in effect, that the use of the series of stop action frames depicting the sexual scenes served to emphasize the sexual theme in the motion picture. In my opinion, these facts bring the present case within the *Ginzburg* decision which indicated that the animation of sexual detail to give the publication in that case a salacious cast amounted to an appeal to the sexual curiosity and appetite and amounted to the pandering condemned in that case.

The Attorney General aptly commented on this aspect of this case in the lower court:

> "You have a book on the cover says 250 illustrations. If you count the illustrations in this book, you will find approximately 100 of the 250 have to do with sexual themes, out of the 250. That is 100 out of 250, which is forty percent of the total against six minutes of 120 minutes or 135 minutes of the film, and if you will look you will find that in a period of some —pages 89 to about 160, you have some 83 or 80 sexual pictures against 60 others, which is about a hundred and twenty-five percent, which indicates there is a very significant emphasis on the pornography we say is in the film in this book, * * * ".

It thus appears that the pandering of sex in the motion picture is generated entirely by the profit motive. By the concentration on sex in the scenario, Grove Press sells the book and by selling the book it sells the sex in the motion picture.

The argument by the appellants (if relevant at all) that the motion picture will be shown only to those members of the community 18 years of age or older is rather

impaired by the findings by the District Court of Johnson County, Kansas, in a recent case entitled "*The State of Kansas* v. *A Motion Picture Film Entitled 'I Am Curious—Yellow'*", No. 6122, Div. No. I, in which the Order was filed on September 5, 1969, and modified in a detail of no importance for this case on September 15, 1969. A copy of the opinion of District Judge Herbert W. Walton in this Kansas case was forwarded to this Court by the Attorney General on October 1, 1969, a copy being sent to counsel for the appellants. In the Kansas case, the motion picture involved in the case at Bar was shown at the Kimo South Theatre (an "art theatre") in Overland Park, Johnson County, Kansas. Advertisements furnished by Grove Press for the motion picture published in the Kansas City Times and the Kansas City Star from June 17 to June 24, 1969, stated, "Admission restricted to adults." The motion picture was advertised as "'a landmark likely to permanently shatter many of our last remaining movie conventions,' says William Wolfe of Cue Magazine." In none of the advertisements, other than the one of June 21, 1969, was there mention of any other theme. The District Court found that although the advertisement on June 21 mentioned such "alleged themes as politics, nonviolence, Zen, commitment, socialism and other subjects, the whole import of the advertisement and the attention of the reader are centered on the obvious and purposeful deletion which implies the word 'sex.'"

In the newspaper advertising of June 18, 1969, no mention was made at all of age restrictions; on June 19, 20 and 21, there was a restriction to persons over 18 years of age with suitable identification; on June 22, there was a restriction to those 18 years and over; and, on June 23 and 24, the advertisements simply stated "adults only."

The enforcement officers took random samplings on the evenings of June 22, 23 and 24, 1969, among persons leaving the theatre (which seats approximately 325 persons)

who appeared to be under 21 years of age. One officer on Sunday, June 22, stopped 10 persons, three of whom were under 21 years of age; of the persons stopped by the other officer on the same night, seven were under 21 years of age. On Tuesday evning, June 24, from those stopped six were under 21 years of age and of those, three were under 18 years of age. On June 22 also, the ticket seller at the theatre sold a ticket to view the motion picture to an identified lad, 17 years of age, without asking the youth his age or asking to see his identification. The lad was thereafter admitted, the ticket taker neither asking his age nor for any identification. There were similar episodes on June 24, 1969.

The Contract of May 18, 1969, between Dickinson Operating Co., Inc. through Glen W. Dickinson, Jr. and Grove Press, Inc. through Barney Rosset, one of its chief officers, to exhibit the motion picture at the Kino South Theatre provided that Grove Press, Inc. would receive 90% of the gross receipts in excess of $1,500 a week, but not less than the following fixed percentages: first week: 70%; second and third weeks: 60%; fourth and fifth weeks: 50%; sixth week: 45%. The minimum run was to be for six weeks with additional time to be negotiated. Grove Press, Inc. was to pay 90% of the advertising costs and all advertising materials content and costs were to be at the discretion of Grove Press, Inc. The contract further provided that Dickinson Operating Co., Inc. was to exhibit the film in its entirety and was not to cut or alter the print, other than to make necessary repairs or when required by a public official or authority, x without the written consent of Grove Press, Inc.

(b)

As the majority points out, we applied the *Roth* test as restated and amplified in *Memoirs* to a motion picture in *Hewitt* v. *Maryland State Board of Censors*, 254 Md.

179, 182-83, 254 A.2d 203, 205 (1969), *supra*, and the restated "rule" has been applied in the present case. In my opinion, in view of the uncertainty in regard to the view of a majority of five justices of the Supreme Court on various aspects of the applicable test, it was wise for us in *Hewitt*, *supra*, as well as in the instant case, to apply the most detailed and comprehensive test enunciated by the justices writing for a majority or a plurality of the Supreme Court in the obscenity cases in that Court. As I have indicated, it is my opinion that the film in the case at Bar is well within the three tests mentioned and is obscene under those tests.

The able argument of the Attorney General and of the Assistant Attorney General, both in the appellee's brief and orally before us, has made me doubt, however, that the third test *i.e.*, that the material is "utterly without redeeming social value" at least in its full vigor is properly applied to a motion picture because of the difference between motion pictures, on the one hand, and novels, pamphlets and other writings, on the other.

As early as 1952 when the Supreme Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("The Miracle"), in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, J.J. concurring; there were no dissents) observed the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas.

> Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." (343 U.S. at 502-503, 72 S.Ct. at 781, 96 L.Ed. at 1106)

Mr. Justice Clark in his concurring opinion in *Kingsley Pictures Corp.* v. *Regents* ("Lady Chatterley's Lover"), 360 U.S. 684, 702, 79 S.Ct. 1362, 1372, 3 L.Ed.2d 1512, 1524 (1959) stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'." (Emphasis in original.)

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman* v. *Maryland*, 380 U.S. 51, 60-61, 85 S.Ct. 734, 740, 13 L.Ed.2d 649, 656 (1965) that:

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Circuit Judge Hays, in the Second Circuit case involving the film in this case in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books." (404 F.2d at 198)

In the State Courts the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau* v. *Fording*, 245 Cal. App.2d 820, 54 Cal. Reptr. 177 (1966) the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact

of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman* v. *Maryland*, 380 U.S. 51, at p. 61 [13 L.Ed.2d 649, 85 S.Ct. 734]). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal.L.Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., *supra*, at p. 708).

"Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." *Id.* at 181.

See also the interesting discussion of this matter by the Court of Appeals of New York in *Trans-Lux Dist. Corp.* v. *Board of Regents*, 14 N.Y.2d 88, 248 N.Y.S.2d 857 (1964), *rev'd per curiam*, 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959 (1965) citing only *Freedman* v. *Maryland*, *supra*, from which it can be inferred that the reversal by the Supreme Court was on the basis of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity. Cf. *Teitle Film Corp.* v. *Cusack*, 390 U.S. 139 (Note 1), 88 S.Ct. 754, 19 L.Ed.2d 966 (1968) in which the Supreme Court held a Chicago

statute invalid under *Freedman*, but noted that it had not considered the issue of obscenity.

The *Roth* test was "*whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*" and it is the *only test* in which a *majority of five justices* of the Supreme Court have ever agreed.

In the *Roth* case, 354 U.S. 476, 483-485, 77 S.Ct. 1304, 1308-1309, 1 L.Ed.2d 1498, 1506-1507 (1957), the Supreme Court stated:

> "... the unconditional phrasing of the First Amendment was not intended to protect every utterance ... All ideas having even the slightest redeeming social importance ... have the full protection of the guaranties ... But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire* ... 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and *morality*. ..." (Emphasis ours.)

The Supreme Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The Court then set out the *Roth* test above set forth.

When then, did the other two tests, *i.e.*, (a) the material must be "patently offensive" and (b) it must be "utterly without redeeming social value" purportedly come into the law?

Apparently, the "patently offensive test" came from the opinion of Mr. Justice Harlan in his opinion in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482, 82 S.Ct. 1432, 1434, 8 L.Ed.2d 639 (1962). This "test," however, only received the concurrence of Mr. Justice Stewart in this case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan. Mr. Justice Black concurred in the result without opinion; Mr. Justice Clark dissented and filed a dissenting opinion. Frankfurter and White, JJ., took no part in the decision. A review of subsequent cases does not indicate to me that a majority of the Supreme Court has committed itself in any one case to the "patently offensive test." Hence, the doctrine of *stare decisis* does not commit the Supreme Court to the "patently offensive test."

The "*utterly* without redeeming social value test" (emphasis supplied) as applied to media pictures apparently came from the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) involving the French motion picture "Les Amants" ("The Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion by Messrs. Justice Brennan, Black, Douglas and Stewart, JJ., concurring in the judgment only. Mr. Justice Harlan dissented as did Mr. Justice Warren

and Justice Clark, so that this "test" did not receive the approval of a majority of the Supreme Court.

Some have thought that the third "test" was finally brought into the law by the decision in *Memoirs*, *supra*, in 1966. But, alas, again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, indeed, in his dissenting opinion in *Memoirs* observed that the social value test was "novel" and that *only three* members of the Supreme Court held to it. He further pointed out that, in his opinion, such a test *rejects* the *Roth* test to which, as above indicated, a *majority* of the Supreme Court *did agree*.

Even in the case of *Redrup* v. *New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) discussed at some length by us in the recent *Hewitt* case, *supra*, the *per curiam* opinion of the Supreme Court was careful to state that the necessity of meeting the three point test was one held *only* by certain justices in *Memoirs*, and did not cite the three point test as the test of the Supreme Court.

Where does this extraordinary situation leave the lower Federal Courts and State Courts in their required effort to apply the *decisions* of the Supreme Court of the United States in obscenity cases? Like the policeman in Gilbert and Sullivan's "H.M.S. Pinafore," their "lot is not a happy one." I have concluded that this Court is not *required* to follow the "three point test" in motion picture cases so far as any *authoritative and binding holding* of the Supreme Court of the United States is concerned, but that we are required to apply and follow the original *Roth* test. This conclusion is indirectly of some importance in the present case because of the statement in the concurring opinion of Circuit Judge Friendly in the Second Circuit case:

> "If the governing rule were still what Mr. Justice Brennan stated in *Roth* v. *United States*, 354 U.S. 476,

489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), namely 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' I might well join Chief Judge Lumbard for affirmance." (404 F.2d at 200)

As I have concluded that the governing rule is indeed the *Roth* test, this would mean that the very excellent opinion of Chief Judge Lumbard *really* should be the opinion of the Second Circuit in that case. I might add parenthetically that, in my opinion, it should have been the majority opinion even on the other theory.[1]

I reiterate, however, that I think this Court was wise in both the recent *Hewitt* case, *supra*, and in the majority opinion to apply the "three point test" in view of the unsettled state of the decisions of the Supreme Court in the obscenity field. If a majority of the Supreme Court finally adheres to the three point test (unfortunately from my viewpoint), we will have applied the correct rule; if a majority finally adheres to the *Roth* test, the appellants cannot complain if we have applied a stricter test than the law, as ultimately determined, required us to do.

I might add that, as we observed in the *Hewitt* case, *supra* (254 Md. at 195, 254 A.2d at 211), Mr. Justice Marshall in the recent case of *Stanley* v. *Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249-50, 22 L.Ed.2d 542, 554 (decided April 7, 1969), seems to equate the cases subsequent to

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[1] I note in support of my position that the three judge court for the United States District Court for the District of Kansas, consisting of Hickey, Circuit Judge, and Stanley and Theis, District Judges, in the recent case of Grove Press, Inc. v. State of Kansas, et al and Lakeside Drive In Theatre, Inc. v. Menghini, et al, Nos. KC-2992 and KC-2997 (consolidated cases) in a per curiam opinion filed October 6, 1969, unanimously agreed with Chief Judge Lumbard's opinion.

the decision in *Roth* as continuing the *Roth* test as he stated, for the Supreme Court:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

I add finally that although the "national" community standard may well be thought to apply reasonably to decisions of the Federal Courts involving the nation as a whole, and the expert testimony in the present case is sufficient to support the conclusion that the film does offend a national community standard, I have grave doubts that a majority of the Supreme Court will ultimately decide that in the exercise by the States of their "broad power to regulate obscenity," the States will be required to apply a "national" rather than a "State" standard as the "contemporary community standard." When a State seeks to clean the Augean stables of obscenity or to prevent the offending material from accumulating, it should be able to consider and apply the community standard of its own community, and not be required to attempt to evaluate the standards of other communities not under its jurisdiction. I hope indeed that a majority of the Supreme Court of the United States will ultimately reach this conclusion.

McWILLIAMS, J., dissenting

I do not agree with the majority's conclusion that the State has met its burden of satisfying the "Roth test." We have held that the triple standard announced by the Supreme Court in *Roth* v. *United States*, 354 U.S. 476 (1957), *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (opinion of Brennan, J.), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U.S. 413 (1966) (opinion of Brennan, J.), is the standard to be applied in Maryland in determining whether certain

writings or pictures, including motion pictures, should be afforded constitutional protection or whether they are obscene and therefore ineligible for an exhibition license.' Because I think the film is not "*utterly* without redeeming social value," I would (reluctantly and with regret) reverse the court below.

Mr. Justice Brennan, in his opinion in *Jacobellis, supra*, said the *Roth* decision recognized

> "* * * that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.* at 484, 487." *Id.* at 191.

[1] I am not impressed with the argument of my brother Barnes in his concurring opinion that "we are *required* [emphasis added] to apply and follow the original *Roth* test" inasmuch as that is the only test which has been expressly approved by a majority of the Supreme Court at any one time. *See* Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Supr. Ct. Rev. 7. It is important to note, however, that the intent of the Supreme Court when it established the "original" *Roth* standard was to provide "safeguards adequate to withstand the charge of constitutional infirmity." *Roth* v. *United States*, 354 U.S. 476, 489 (1957). Mr. Justice Brennan, writing for a majority of the Court in *Mishkin* v. *New York*, 383 U.S. 502 (1966), pointed out that "[s]tates are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition." * * *" *Id.* at 507. There is also little doubt that the "three-point" test favored by this Court, a plurality of justices of the Supreme Court, and by a substantial majority of the several states, *see* 5 A.L.R. 3d 1158 (1966) and Later Case Service, is sufficiently adequate "to withstand the charge of constitutional infirmity." We might also note that although, as Judge Barnes indicates, a majority of the Supreme Court has not agreed on any one standard since *Roth*, it clearly appears that the standard set forth in that case would not receive the approval of a majority of that Court today. *See Redrup* v. *New York*, 386 U.S. 767, 770-71 (1967) (per curiam).

As a result, he said

> "* * * that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Id.*

We cited the opinion of Mr. Justice Brennan with approval in *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 105 (1965).

In *Memoirs* (i.e., *Fanny Hill*), *supra*, Mr. Justice Brennan wrote that courts could not disregard the word "utterly" when applying the third element of the standard which we follow. We complied with Mr. Justice Brennan's caveat in *Hewitt* v. *Maryland State Board of Censors*, 243 Md. 574 (1966), where we decided that the film "This Picture Is Censored" was not obscene and we referred to his conclusion that the Massachusetts court had "misinterpreted the social value criterion." We quoted the following passage of the Massachusetts court's opinion to illustrate its application of the social value criterion:

> "'It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was *expert testimony, much of which was strained*, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony

> may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene.' (Emphasis supplied.)" *Id.* at 595.

We also noted Mr. Justice Brennan's interpretation of the criterion:

> "Hence, even of the view of the court below that *Memoirs* [Fanny Hill] possessed *only a modicum of social value*, its judgment must be reversed . . . ." *Id.* (Emphasis added.)

We concluded our opinion by stating that

> "* * * we have no difficulty whatever concluding that if *Memoirs* has 'redeeming social value,' then, *a minori*, so does the film in this case, however, cheap, dull and tawdry it may be * * *. The testimony of the 'experts' produced by the Board support, not the finding of the trial judge, but a finding that the film is 'not *utterly* without redeeming social value.' (Emphasis supplied.)" *Id.* at 596.

As I see it, based on my reading of *Roth*, *Jacobellis* and *Fanny Hill*, and our own decision in *Hewitt*, a motion picture[2] will be constitutionally protected if there is a mere

[2] In its opinion the majority indicated that "* * * we cannot ignore the visual impact of a motion picture as contrasted with the printed word." Judge Barnes in his concurring opinion seems to suggest that different standards apply to the determination of obscenity in books as opposed to motion pictures. This state, of course, has always recognized that there are differences between the two medias and it has subjected motion pictures to a censorship scheme of prior restraint. The written word is not subject to such restraint although its possession may be a criminal offense if it is obscene. Code, Art. 27, §§ 417-18 (1967 Repl. Vol.). The

presence of matters of social importance even though the matter may in fact, be outweighed by the film's prurient appeal. *See Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963).

Applying the above observations to this film I question that it is obscene in the technical sense. The majority found it unnecessary to detail the opinions of the many expert witnesses who testified but it seems to me that some comment should be made. The defense offered an impressive array of witnesses. Some who testified are considered to be the foremost authorities in this state on the motion picture, and of these a few have testified for the State in previous censorship cases. Dr. Richard A. Macksey, Acting Director of the Humanities Center of the Johns Hopkins University, stated that he has taught more than a dozen different courses about films and film making and that he is a member of the Board of the Maryland Film Festival. He said the film is "concerned clearly with * * * conflicts between generations," "the doctrine of non-violence as this relates to Sweden's particular role in Europe" and with "the kind of malaise of the so-called

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Supreme Court has approved the prior restraint of motion pictures so long as the censorship scheme has procedural safeguards. *Freedman* v. *Maryland*, 380 U.S. 51, 60-61 (1965). However, the Supreme Court has never held that the standard applied to books as opposed to films should not be the same. As Judge Friendly put it:

> "* * * I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation, which might import further confusion into a subject already sufficiently confounded. *Jacobellis* related to a film and neither the majority nor the dissenting opinions suggested that any stricter standard would apply. The 5-to-4 *per curiam* affirmance in *Landau* v. *Fording*, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967), affords too frail a foundation to support a construction of this sort." *United States* v. *A Motion Picture Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 201 (2nd Cir. 1968) (concurring opinion).

welfare state in Sweden, the ostensibly classless society." The film, he continued, covered "a wide range of social attitudes" and had "artistic merit."

Dr. Lincoln F. Johnson, Chairman of the Fine Arts Department of Goucher College, has studied motion pictures seriously for 18 years and he regularly teaches courses in the history of motion pictures and film productions. He has served also on the selection body for the American Film Festival and he views "between 100 and 150" commercial films a year. He testified that the film has "cultural significance" and "cinematic merit."

Dr. Peter H. Rossi, a sociologist, is Chairman of the Department of Social Relations of the Johns Hopkins University. He has held editorial positions on three sociological journals and he has been a consultant to the Commission on Pornography and other national commissions as well. He testified that the film has "social significance" inasmuch as it is descriptive of the criticism by young people throughout the world of the present form of society. As Dr. Rossi put it:

> "Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but is critical of the Chinese, the Russians and the like. It is not a very articulated message. It is a film which says there is something wrong and it is a film which says also that young people like the heroine are searching for a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives."

Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland (Baltimore campus), has made a serious study of the theater arts. He testified that the film has "artistic merit" inasmuch as it made

"a good try at some interesting forms, using a number of different frameworks and a number of themes; trying to do a number of things at the same time."

Dr. Ronald H. Paulson is Professor of English and Chairman of the English Department of the Johns Hopkins University. Dr. Paulson stated that he views, on the average, two films a week and that he has published works on literary criticism. He further testified that "* * * this is a film with * * * artistic esthetic merit. It holds together; it is relatively coherent, judged by the very best movies; it is dealing with an important subject, * * * [the] breakdown in the relationship between the symbols of authority and the people, between parents and children." Moreover, he stated that the film has social merit "in the sense that it is dealing with important social problems."

Jaromir Stephany is Chairman of the Department of Photography and Films at the Maryland Institute and he teaches courses in film making and film history. Additionally, he has been Chairman of the Maryland Film Festival and he has appeared in court on three occasions to testify for the Board of Censors. He testified that the film has artistic merit and he offered the further comment that "[i]t is rather strongly put together" and "is certainly one of the outstanding films made within the last year."

The testimony of the State's witnesses was less impressive. Reuben Kramer testified that the movie was "totally inartistic" inasmuch as the sex scenes "contaminated the picture." He conceded that he does not regularly attend the movies and has no expertise in the "cinematographic art medium." Furthermore, he stated that in his opinion very few films have any artistic merit and "are just stupid." However, he indicated that this film "is not stupid."

William Forshaw, Senior Subjects Specialist in the Humanities Department at the Pratt Library testified

that he is "interested in the preservation of American film" and is a film consultant and historian to the Baltimore Museum of Art. He stated that in his opinion, which he described as a minority one among his colleagues, the film had no social or literary merit.

Dr. Paul Yaffe is employed by the Baltimore City Schools as Director of the Educational Testing Service. He is also a part-time practicing psychologist, with "more than average ability in the area of projective techniques." He emphasized that he did "not pose as an expert of films, either from experience or study." Dr. Yaffe testified that in his opinion the film "pretended" to have socially redeeming value. He pointed out that "the socially meaningful situation is * * * shallow and if the film were to stand on it alone it could have no real redeeming features in the sense that if would be instructional or would clarify situations, and the like."

It is interesting to note that Judge Carter in the court below stated that he was "* * * impressed by the testimony of one witness, at least as * * * [he] interpreted it, who testified that * * * this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes."

The reviews produced by the appellant were written by prominent movie critics and they were equally impressive. Hollis Alpert, whose reviews have been noted by this Court in previous decisions, *see Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors, supra*, wrote in the Saturday Review that the purpose of the film's director was "* * * to explore and say something, through cinematic methods, about the political and social climate of his country, Sweden." To the same effect are the reviews of Richard Schickel in Life, Vincent Canby in the New York Times, John Simon in the New York Times, Richard Atcheson in Holiday, Gregory McDonald in the Boston Evening Globe, Bernard L. Drew in The Hartford

Times, Ernest Schier in the Philadelphia Bulletin and the reviewer of the National Observer. The film was reviewed unfavorably by James J. Kilpatrick in the Los Angeles Times and Rex Reed in the New York Times.

The Attorney General does not deny that the credentials of the appellant's witnesses are impressive, but he argues that "this does not free the opinions they expressed from critical analysis." I must agree, I am bound to say, however, that they reflect at least "a modicum of social value." *Memoirs, supra; Hewitt, supra.* I cannot agree with the majority, however, that the film's social and sexual themes were not intertwined. As Judge Hays put it:

> "It is even more clear that 'I Am Curious' is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the 'experts' who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual efforts that the first amendment was designed to protect." *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 199-200 (2nd Cir. 1968).

Judge Friendly, in his concurring opinion, said he did not feel that the sexual episodes "* * * were simply lugged in and bore no relationship whatever to the theme." Moreover, he could not "* * * conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting." *Id.* at 201.

Finally, I must take issue with Judge Barnes' suggestion that *Ginzburg v. United States*, 383 U.S. 463 (1966) is dispositive of this case. I should point out that *Ginzburg* did not involve a censorship scheme of prior restraint

nor did it involve a motion picture.[3] It is difficult to see how evidence of the type of "pandering" found by the Supreme Court in *Ginzburg* will ever be present where, as here, the film can neither be shown nor would it be advertised until it is approved and licensed by the Board of Censors. *See United States v. 4100 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967). To be sure we did find evidence of pandering in our recent decision in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179 (1969). The evidence in that case revealed that the theaters at which the film—"Odd Tastes"—was to be shown specialized in the exhibition of "sex ploitation films." It was evident also that the film's title was highly suggestive per se. Evidence of this sort is not present in the case at bar. The film was scheduled to be exhibited in Baltimore at the 7 East Theatre. The type of film normally exhibited at this theater (and its sister theater—5 West) is described in the following exchange between the appellant's attorney and Dr. Johnson:

> "Q. (Mr. Weiner) How does this film, 'I Am Curious (Yellow)', fit in with the other films which are shown at those theatres? A. Well, first of all, it is a foreign film. Secondly, it is a film, in my mind of exceptional merit, and thirdly, films shown in these two theatres seriously consider serious problems. These two theatres show films which are not simply entertainment films. They are films which are important artistically, which have some cultural significance, which raise questions of importance, and I am sure influence public opinion.

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[3] *Ginzburg*, of course, involved the pandering of a book and a magazine. The Supreme Court has not, to date, held that the *Ginzburg* doctrine is applicable to motion pictures. It is also apparent that the Court will limit *Ginzburg* to its facts. *See Redrup v. New York*, *supra*, and *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam), *noted in* 19 Case W. Res. L. Rev. 748 (1968).

"Q. And in your opinion, does the film 'I am Curious (Yellow)' do these things that you have just described A. Oh, yes, indeed."

Furthermore, it is not claimed nor does it appear that the title of this film, standing alone, is suggestive of its content. *Compare* the evidence of pandering found by Chief Judge Murphy in *Lancaster* v. *State*, 256 A. 2d 716 (Md. App. 1969).

I have no doubt that the notoriety this film has acquired has been more the result of the abundant publicity generated by the confiscatory action of the United States Customs Service, the ensuing decisions of the federal courts and the film's financial success than any one advertisement or book.[1] I expect the film's reputation will not suffer as a result of the action of my brothers of the majority.

It must not be supposed, however, that I have any enthusiasm for this film. I did not enjoy seeing it. I thought it was a crashing bore. Nevertheless it is not for us "to determine the quality of a * * * [film]. Our duty is to respect and enforce in full measure the freedom of expression guaranteed by state and federal constitutions." *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 151, 121 N.W. 2d 545, 554, 5 A.L.R. 3d 1140, 1152 (1963).

Chief Judge Hammond and Judge Singley have authorized me to state that they concur in the views expressed in the foregoing opinion.

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[1] According to the appellant, "[t]he film was distributed nationally and it first opened in New York City on March 10, 1969. As of July 1, 1969 * * * it has been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland. The film is currently being shown in these places, some of which are in the jurisdictions contiguous to the State of Maryland, and contracts have also been executed with exhibitors for showing in 27 additional cities."

APPENDIX B

The judgment of the Court of Appeals of Maryland entered on October 22, 1969, is included in the certified record of the case filed with the Clerk of this Court.

APPENDIX C

Memorandum Opinion and Order

(Filed July 31, 1969)

On July 11, 1969, the Maryland State Board of Censors (the Board) filed a petition pursuant to Section 19 of Article 66A of the Annotated Code of Maryland (1967 Replacement Volume) for judicial determination as to whether a certain motion picture titled "I Am Curious (Yellow)" is entitled to be exhibited within the State of Maryland considering the provisions of Section 6 of Article 66A of the said Code. This film was submitted to the Board for examination and licensing on July 1, 1969, by the applicant, Howard Wagonheim, and Grove Press, Inc., manufacturer. The Board viewed said film and on July 8, 1969, disapproved it under the provisions of Section 6 of Article 66A of the Code; said Order of disapproval being as follows:

> "After reviewing the entire film, and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex, that it deals purposely and effectively with sex in a manner which appeals to the prurient interest that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive."

Arrangements were made for a viewing thereof and the film was viewed by the Court.

An answer was filed by the defendant asserting, *inter alia*, (1) that the film when released for viewing by the public will not be exhibited to any person under eighteen years of age; (2) that the film has already been declared to be not obscene by a final judgment of the United States Court of Appeals for the Second Circuit *in rem* action brought by the United States of America pursuant to 19 U.S.C.A., Section 1305, and that further judicial review of

the film by a State court prior to showing of the film is precluded; and (3) that Article 66A, Section 6 of the Maryland Code is unconstitutional and void, being in conflict with the free speech clause of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The real issue as to this film is whether it is obscene in the constitutional sense in that the three elements upon which obscenity is tested coalesce. The burden of proof must be met by the Board.

In presenting its case, the Board first established that the film had been disapproved and the Order of Disapproval was introduced as an exhibit. Thereafter, a number of witnesses were presented, all of whom I felt were qualified to testify as experts in their particular fields. These witnesses' testimony supported the Board's position that the film is obscene tested by the standards laid down by the Supreme Court of the United States and by the Court of Appeals of Maryland. The legal requirements for proof of obscenity are set forth in two principal cases: In Maryland, *Sanza* v. *Maryland Board of Censors*, 245 Md. 318 (1967), and in the Supreme Court of the United States, the case of *Roth* v. *U. S.*, 354 U.S. 476. These cases hold that material is not to be labeled as obscene unless proved by competent evidence (including testimony by an expert witness or witnesses) and (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value.

The defense presented numerous witnesses of exceptional talent and educational background. As I recall it, only one of them had less than a PhD degree. They had

credit for innumerable articles and books and other materials in connection with their chosen fields. They were all persons of high standing in positions in universities and other educational activities in Baltimore City. They were certainly adequate to testify as to the opinion and thinking of persons of such high intellectual standards, but I am not certain that they were aware of the attitude of the average person with respect to the problems involved in this case, yet in certain respects, concerning which I shall comment later, and which in my opinion is pertinent, practically all seemed to agree.

In view of the fact that I have but a limited period of time in which to file this opinion, it is impossible to set out all the background qualifications of these witnesses and no doubt on appeal this will be done so that the Court of Appeals will have the advantage of the full record as to all witnesses, including those for the State and those for the Defendant.

Since the film must be viewed at each judicial level, a complete factual analysis of the film is not essential.

After having viewed the film and having listened to the testimony of the witnesses for approximately two weeks, it is my considered judgment, thought by many I am sure to be conservative, that the film, "I Am Curious (Yellow)" meets the tests of obscenity previously laid down by the Courts and that the Order of the Maryland State Board of Picture Censors should be affirmed.

This film was produced in Sweden and the dialogue is in Swedish; English subtitles have been added. In an action brought in the United States District Court for the Southern District of New York, pursuant to 19 U.S.C., Section 1305, after a jury trial, it was ordered forfeited and confiscated. An appeal from that decision resulted in a reversal by a two to one decision. On the ground that under standards established by the Supreme Court, a showing of the picture could not be prohibited; it was also deter-

mined in said appeal that the question of obscenity being a constitutional question, the District Court should not have submitted that question to a jury. An examination of the opinion of Judge Thomas F. Murphy of the District Court on a motion for summary judgment and of the opinions of the three appellate judges is interesting. Among the comments of Judge Murphy in his opinion, we find the following:

> "The film was exhibited to me on April 10, 1968. To me it was repulsive and revolting, the sexual scenes having no relationship to the story line or plot — if there was one. These sexual scenes ranged from copulating in a tree; copulating astride a balustrade of a public building and in the nude in a room; with other scenes of buggery, cunnilinction (sic) and fellatio, all in the nude. The final scene, in conformity to the dominant theme, shows the female lead performing an orchiectomy or peotomy or both on her murdered lover with a kitchen carving knife.
>
> "If the film has a message, whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hard core pornography. In my opinion, the average person applying community standards would find that the dominant theme, taken as a whole, appeals to prurient interest, is insulting to the American public and is devoid of social value."

Circuit Judge Haynes wrote the majority opinion for the United States Court of Appeals for the Second Circuit, and some of his comments are as follows:

> "There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some

of them quite unusual. There are scenes of oral-genital activity.

"It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts.

* * * "Nudity and sexual activity in motion pictures, it is argued, bear a close resemblance to nudity and sexual activity in a public place. Obviously conduct of this type may be forbidden."

Circuit Judge Friendly, concurring "with no little distaste," pointed out the divergence of views within the Supreme Court and the consequent multiplicity of opinions on the subject of obscenity in referring to an article by Magrath, The Obscenity Cases: Grapes of Roth, 1966 Supp. Court Rev. 7, 56-57, in which it is stated that there are "five separate and contradictory tests." In his concurring opinion, Judge Friendly seems to suggest that the States should not be preempted by the Federal Government as to hard-core pornography because he stated "Mr. Justice Harlan initiated the hard-core pornography limitation with respect to federal action although he would *allow greater leeway to the states.*" (Emphasis supplied.)

Later on in his opinion, Judge Friendly stated:

* * * I would agree that the presence of 'redeeming social value' should not save the day if the sexual episodes were simply lugged in and bore no relationship whatever to the theme; a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms. While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and

the sexual episodes and displays of nudity is wholly wanting."

In concluding his concurring opinion, Judge Friendly said:

> "When all this has been said, I am no happier than Chief Judge Lumbard about allowing Grove Press to bring this film into the United States. But our individual happiness or unhappiness is unimportant, and that result is dictated by the Supreme Court decisions."

He concludes his opinion by admonishing the importer, distributors, and exhibitors of the film that it should not be exhibited to minors and that it should not be advertised in a manner calculated to capitalize on its "extensive portrayals of nudity and sexual activity rather than its *supposed* (emphasis supplied) serious message," and with "reservations and no little distaste" Judge Friendly concurred with Judge Hays in the reversal of the District Court.

Taking up Chief Judge Lumbard's dissenting opinion, he referred to the verdict of the jury which, after seeing the motion picture and hearing the "experts" regarding its significance, "unanimously found that its dominant theme appeals to a prurient interest in sex, that it is patently offensive because it affronts contemporary community standards, and that it is utterly without redeeming social value." Chief Judge Lumbard thought that the jury verdict should not be disturbed.

Aside from the question of whether or not the case was properly submitted to a jury Chief Judge Lumbard stated:

> "It is admitted that in its explicitness this picture goes beyond anything thus far exhibited in this country. As my brother Hays says, 'It seems to be con-

ceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing.' The sexual aspect of the film does not arise from the plot, *as that is non existent;* (emphasis supplied) it arises from a decision by the director, Vilgot Sjornan, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public.

"Whatever one can say about the alleged significance of the film which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

"While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest."

In concluding, Chief Judge Lumbard, in his dissenting opinion, said "I join Judge Friendly in pointing out that state and local authorities may intervene if minors are admitted to the audience or if those who promote the exhibition of the film do so in ways which capitalize on the film's 'extensive portrayals of nudity and sexual activity'."

In the presentation of the case, a number of reviews and other articles were introduced, both pro and con. An excellent article appeared in the Wall Street Journal under date of March 14, 1969, by Alan Adelson. He seems to summarize the problem in one paragraph reading as follows:

> "Some viewers may be pleased, others perplexed or angered, but the showing of 'I Am Curious-Yellow' seems to qualify as a significant event. Those who tilt against all forms of censorship see it as marking the emergence of the U.S. as a leader in free speech and expression. To quite another group, the film is the final confirmation of a disaster they have long seen brewing. The growing permissiveness of American society, they maintain, has finally reached total depravity."

Perhaps there may be a middle and reasonable ground with regard to this problem yet to be discovered. Vocal minority in any given situation will frequently prevail unless the forces of the opposition become aware of what is going on. There is a point of view today that there should be a curtailment of the forces of pornography and similar associations on and off the screen, television, radio, etc.; and it would appear that the time has come to halt or at least more clearly define their program. This does not mean a return to puritanism by any stretch of the imagination; but it does mean a return to sense and decency.

In this case I was impressed by the testimony of one witness, at least as I interpreted it, who testified that, in his opinion, this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes.

Almost without exception, all the witnesses testified that this film should not be shown to a minor; and they,

generally speaking, fixed the age of a minor as one under eighteen years of age. Of course, there are those who would argue that this perhaps is the age where a film of this character would do the most harm. We have not adopted in Maryland the idea, advocated by many, of classification; nor do I believe that under existing law, our courts have the right to permit a showing of any film with age restrictions. While I think these questions are part of the case and actually could be determinative of the issue, my conclusion is not on that basis.

In my opinion, and I so find, this film "I Am Curious (Yellow)" is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value.

In arriving at my determination of this case, I first heard opening statements, after which I viewed the film. Thereafter, over a period of approximately two weeks, extensive testimony was taken, at the conclusion of which I thought it advisable, in the light of said testimony, to again view the film. At the conclusion of the second viewing, I was thoroughly convinced that the Board's action in this case was proper and should be affirmed and that the testimony of the expert witnesses offered by the exhibitor and producer and their explanations of the reasons for the various objectionable scenes must be rejected.

For the reasons set forth above, it is this 31st day of July, 1969, ORDERED, ADJUDGED AND DECREED by the CIRCUIT COURT OF BALTIMORE CITY that the film "I Am Curious (Yellow)" be disapproved for licensing as in violation of Article 66A, Section 6, as heretofore found by the petitioner.

JOSEPH L. CARTER,
Judge.

APPENDIX D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A MOTION PICTURE FILM ENTITLED "I AM CURIOUS-YELLOW" ("JAG ÄR NYFIKEN-GUL") (35 mm., Black and White 6 Double Reels, 11,746 ft., Swedish soundtrack with English subtitles), Grove Press, Inc.,
Claimant-Appellant.

No. 569, Docket 32448.

United States Court of Appeals
Second Circuit.

Argued July 22, 1968.

Decided Nov. 26, 1968.

Edward de Grazia, New York City (Richard T. Gallen, New York City, on the brief), for appellant.

Lawrence W. Schilling, Asst. U.S. Atty. (Robert M. Morgenthau, U.S. Atty. for the Southern District of New York and David Paget, Asst. U.S. Atty., on the brief), for appellee.

Before LUMBARD, Chief Judge, and FRIENDLY and HAYS, Circuit Judges.

HAYS, Circuit Judge:

This is an appeal from a judgment of the district court, after a jury trial, ordering the forfeiture and confiscation under Section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305 (1964)[1] of the motion picture entitled "I Am Curious-

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[1] § 1305. Immoral Articles; Prohibition of Importation

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any

Yellow." We reverse the judgment on the ground that under standards established by the Supreme Court the showing of the picture cannot be inhibited.

obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *Provided*, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: *Provided further*, That the Secretary of the Treasury may in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

"I Am Curious-Yellow" was produced in Sweden and the dialogue is in Swedish; English subtitles have been added. As with many other contemporary artistic productions there can be a difference of opinion as to what the picture is "about."[2] It would perhaps not be demonstrably wrong to say that it is concerned with that subject which has become such a commonplace in contemporary fiction and drama, the search for identity. It is the story of a young girl who is trying to work out her relationship to such political, social, and economic problems as the possibility of a classless society, the acceptance of the Franco regime, and the policy and practice of nonviolence. At one point the girl experiments with oriental religious ritual and meditation. The girl's inter-personal relationships are also pictured, including particularly her relation to her father, presented as an idealist who has become disillusioned and has given up meaningful activity. A fairly large portion of the film is devoted to the relations between the girl and her young lover.

A number of different techniques are employed in the production of the film. For example much of the early part is in terms of "cinema verité," showing the girl asking questions on subjects of public importance of the ordinary man or woman in the street. The problem of the nature

[2] Thirteen "experts" (professional critics, English professors, a minister, sociology professors, a "professor of film," psychiatrists, a novelist) gave testimony as to their views of the social value of the film. Some of their answers to questions as to the dominant theme of the film were: change, transition; the nature of reality or of "modern" reality; the New Left; the interrelationship of various aspects of human activity; the quest for values; the beliefs and commitments of the young; the younger generation; the generation gap; the relationship between fantasy and reality; young people's search for identity and self-recognition; political, social and sexual maturity; political responsibility; the use of ritual to establish fundamental truth; the nature of politics; the complexity of modern reality.

of reality is suggested by passages representing the girl's fantasies and by the injection into the story of material concerning the making of the picture itself, such as the director's relations with the leading actress.

There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some of them quite unusual. There are scenes of oral genital activity.

It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts.

The government argues with considerable cogency that the standards by which motion pictures are to be judged may be different from those that are used in the case of books. It points out that a motion picture reproduces actual conduct so that it can be seen and heard. Books are read by individuals in private, whereas motion pictures are viewed in public. Nudity and sexual activity in motion pictures, it is argued, bear a close resemblance to nudity and sexual activity in a public place. Obviously conduct of this type may be forbidden.

[1] No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books, see Freedman v. Maryland, 380 U.S. 51, 60-61, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); United States v. One Carton Positive Motion Picture Film Entitled "491," 367 F.2d 889, 907 (2d Cir. 1966) (Lumbard, Ch. J., dissenting); but see Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Nevertheless the comparison urged by the government between nudity and sexual activity in a public place and the same matters as portrayed in a motion

picture such as "I Am Curious" is far fetched. In the motion picture the material is a part of an artistic whole and is united with and related to the story and the characters which are presented. This is vastly different from a sudden unrelated episode taking place in public. The exhibition in a motion picture of an isolated instance of sexual intercourse or of irrelevant nudity, which would indeed be equivalent to public display, could be halted under the established standards, just as could similar material if it appeared in print.

[2, 3] Whatever differences there may be in the application of obscenity standards, a motion picture, like a book, is clearly entitled to the protection of the first amendment. Joseph Burstyn, Inc. v. Wilson, supra; Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). And the test of whether a motion picture is to be condemned is the three-fold test stated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty. Gen. of Com. of Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966):

> "[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

[4] The issue of the obscenity of "I Am Curious" was submitted to the jury under this three-fold test and the jury found the picture obscene. However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court. As Mr. Justice Harlan said in Roth v. United States, 354 U.S. 476, 497-98, 77 S.Ct.

1304, 1316, 1 L.Ed.2d 1498 (1957) (concurring and dissenting):

> "[I]f 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's 'Ulysses' or Boccaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.'" (Emphasis in original.)

See also the remarks of Mr. Justice Brennan in Jacobellis v. Ohio, supra, 378 U.S. at 187-90, 84 S.Ct. 1676.

[5] Applying the *Memoirs* standards we find that the picture cannot be classified as obscene on at least two of the three grounds comprising the test.

Although sexual conduct is undeniably an important aspect of the picture and may be thought of as constituting one of its principal themes, it cannot be said that "the dominant theme of the material taken as a whole appeals to a prurient interest in sex." Whatever the dominant theme may be said to be (see footnote 2 supra) it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as "prurient."

It is even more clear that "I Am Curious" is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the "experts" who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is

quite certain that "I Am Curious" does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual effort that the first amendment was designed to protect.

On the issue of whether the picture is "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," the jury's verdict may carry more weight. (But see Jacobellis v. Ohio, supra, 378 U.S. at 192-95, 84 S.Ct. at 1680; cf. United States v. Klaw, 350 F.2d 155 (2d Cir. 1965); see also Ginzburg v. United States, 383 U.S. 463, 479-80, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (Black, J., dissenting)). However, it is unnecessary for us to pass upon this third test, since the picture is not obscene under the other two of the Supreme Court's standards.

We hold, therefore, that the picture cannot be condemned under Section 305.

FRIENDLY, Circuit Judge (concurring):

This court's responsibility here is limited. We are not, as Chief Judge Lumbard's dissent seems to assume, writing on what is largely a clean slate, but rather on one already well covered by our superiors. Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed with regard to obscenity. That task, to be sure, is not altogether easy in light of the divergence of views within the Court and the consequent multiplicity of opinions; a scholarly article has deduced from the spate of decisions in 1966 no less than "five separate and contradictory tests." Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Court Rev. 7, 56-57.[1]

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[1] The author notes that these three decisions, Memoirs v. Massachusetts, 383 U.S. 413, 86 S. Ct. 975 (1966); Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 912 (1966); and Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966), gave rise to fourteen opinions, which spread over more than a hundred pages of the United States Reports. Id. at 7-8.

If the governing rule were still what Mr. Justice Brennan stated in Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," it might well join Chief Judge Lumbard for affirmance. But, quite clearly, it is not. The modification began with the opinion of Mr. Justice Brennan, writing also for Mr. Justice Goldberg, in Jacobellis v. Ohio, 378 U.S. 184, 191-192, 84 S.Ct. 1676 (1964), and the transformation was completed in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975 (1966). There Mr. Justice Brennan, in an opinion joined by the Chief Justice and Mr. Justice Fortas, while professing adherence to *Roth*, emerged with a much more permissive standard. Under *Memoirs* a publication cannot be condemned simply because "the dominant theme of the material taken as a whole appeals to a prurient interest in sex" and "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Although these criteria are met, "a book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." 383 U.S. at 418-420, 86 S.Ct. at 978. The deliberate character of this change was highlighted in the dissents of Mr. Justice Clark, 383 U.S. at 451, 86 S.Ct. 975, and Mr. Justice White, 383 U.S. at 460-462, 86 S.Ct. 975. Judge Hays' opinion sufficiently demonstrates the existence of the required modicum of social value here.

It is true that in *Memoirs* Mr. Justice Brennan wrote only for three Justices. But it is plain that three other

members of that bench would have opted for an even more permissive standard and a fourth would have done so for federal action. Justices Black and Douglas have consistently considered all obscene matter to be "constitutionally protected, except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests," Magrath, supra, 1966 Sup. Court Rev. at 56. Mr. Justice Stewart believes that the First Amendment permits the outlawing only of hard-core pornography. Jacobellis v. Ohio, supra, 378 U.S. at 197, 84 S.Ct. 1676 (concurring), and Ginzburg v. United States, 383 U.S. 463, 499-500, 86 S.Ct. 942 (1966) (dissenting). Mr. Justice Harlan initiated the hard-core pornography limitation with respect to federal action although he would allow greater leeway to the states, Roth v. United States, supra, 354 U.S. at 496, 77 S.Ct. 1304 (concurring and dissenting), and he continues to hold this view, Ginzburg v. United States, supra, 383 U.S. at 498, 86 S.Ct. 942 (dissenting).

While I do not challenge Chief Judge Lumbard's views about the offensive character of the extensive displays of nudity and sexual activity in "I Am Curious-Yellow,"[2] the latter falls short of Mr. Justice Clark's description of those which apparently comprise almost all of "Memoirs of a Woman of Pleasure," 383 U.S. at 445-446, 86 S.Ct. at 989. Not truly disputing that, the Government makes two arguments for a different result here. The first is that a stricter standard should apply to motion pictures and plays than to books. Although, for reasons indicated in the opinions of both of my brothers, there might be merit to this as an original question, I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation, which might

[2] Some but by no means all of the latter would fit Mr. Justice Goldberg's description of "'fragmentary and fleeting.'" Jacobellis v. Ohio, supra, 378 U.S. at 197-198, 84 S. Ct. 1676.

import further confusion into a subject already sufficiently confounded. *Jacobellis* related to a film and neither the majority nor the dissenting opinions suggested that any stricter standard would apply. The 5-to-4 *per curiam* affirmance in Landau v. Fording, 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1967), affords too frail a foundation to support a construction of this sort.[3] The other is that there is no sufficient nexus in this film between the scenes of nudity and sexual activity and the problems of the girl—one could hardly call her the heroine—in trying to work out her relationship with life. Although *Memoirs* did not in terms require such a nexus, I would agree that the presence of "redeeming social value" should not save the day if the sexual episodes were simply lugged in and bore no relationship whatever to the theme; a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms. While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting.

The only point requiring further discussion is Chief Judge Lumbard's elevation of the role of the jury. This has its attractiveness, if only in relieving busy appellate courts from having to spend so much time on cases like this. See O'Meara & Shaffer, Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Lawyer 1 (1964). But I find little support for his thesis in the many opinions of members of the Supreme Court during the last decade. Even Chief Justice Warren's more moderate statement in dissent in Jacobellis v. Ohio, supra, 378 U.S. at 202-203, 84 S.Ct. at 1686, that he would subject the judgments of lower courts "to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made," was concurred in solely by Mr. Justice Clark. Squarely to the contrary

[3] At the argument appellant's counsel pointed to a number of factors present in Landau but not here that would have provided the basis for that decision.

are Mr. Justice Harlan's observations in dissent in Roth v. United States, supra, 354 U.S. at 497-498, 77 S.Ct. 1304, and in speaking for himself and Mr. Justice Stewart in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), and Mr. Justice Brennan's expressions for himself and Mr. Justice Goldberg, joined in this respect by Mr. Justice Harlan, in Jacobellis v. Ohio, supra, 378 U.S. at 189-190, 203, 84 S.Ct. 1676. Placing the decisional task upon judges is a natural consequence of the emphasis on "a national standard of decency," Manual Enterprises v. Day, supra, 370 U.S. at 488, 82 S.Ct. 1432 (Harlan, J.), and Jacobellis v. Ohio, supra, 378 U.S. at 194-195, 84 S.Ct. 1676 (Brennan, J.), a principle peculiarly applicable to a federal statute governing the exclusion of a film from the entire United States.[4] Likewise the jury has no special competence on the issue of "redeeming social value." Finally, the Director of the Imports Compliance Division of the Bureau of Customs here conceded that the film had social value; the contrary verdict cannot be supported, for reasons outlined in Judge Hays' opinion; and the issue of a sufficient nexus is peculiarly unsusceptible for jury determination and never was submitted to it.

When all this has been said, I am no happier than Chief Judge Lumbard about allowing Grove Press to bring this film into the United States. But our individual happiness or unhappiness is unimportant, and that result is dictated by Supreme Court decisions. If we could depart from the plurality opinions in favor of the hardcore pornography test advocated by Mr. Justice Stewart and, for federal

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[4] Mr. Justice Brennan's dissent in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), quoted in the dissent here, antedated development of the "national standard" concept. While the jury is well adapted to reflect "the voice of the country-side," see 2 Pollock & Maitland, History of English Law 624 (2d ed. 1952), it would have even more difficulty than judges in determining what would be offensive nationally. See O'Meara & Shaffer, supra, at 8.

action, by Mr. Justice Harlan which, we are told, would at least have the merit of manageability, see Magrath, supra, 1966 Sup. Court Rev. at 69-77 reversal would be still more clearly dictated. What we ought to make plain, however, and not at all in a "tongue-in-cheek" fashion, is that our ruling is limited in two respects: The importer has represented that it intends to require exhibitors to exclude minors from the audience; it must realize that if this representation should be violated, the film and its distributors and exhibitors will be subject to attack under the principle of Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). The importer, distributors and exhibitors should also realize that if they advertise the film in a manner calculated to capitalize on its extensive portrayals of nudity and sexual activity rather than its supposed serious message, Ginzberg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), will be applicable.

With these reservations and with no little distaste, I concur for reversal.

LUMBARD, Chief Judge (dissenting):

I dissent and vote to affirm the judgment of the district court which held that the film "I Am Curious—Yellow" should be barred from importation into the United States. That judgment was entered upon the verdict of a jury which, after seeing the motion picture and hearing the "experts" regarding its significance, unanimously found that its dominant theme appeals to a prurient interest in sex, that it is patently offensive because it affronts contemporary community standards, and that it is utterly without redeeming social value. All are agreed that Judge Murphy's charge correctly stated the law and instructed the jury. Indeed, counsel for the appellant took no exception whatever to the charge. I see no good reason why that jury verdict should be disturbed.

My colleagues give no satisfactory explanation why jurors are not as qualified as they to pass upon such questions. The conclusion is inescapable that they really think that the issue of obscenity can be entrusted to juries only if the judges themselves (or, as here, a majority of them) think the matters in question go beyond the limits allowed by law. I had not supposed that only those who wear federal judicial robes are qualified to decide whether a motion picture has any redeeming social value.

It is admitted that in its explicitness this picture goes beyond anything thus far exhibited in this country. As my brother Hays says, "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing." The sexual aspect of the film does not arise from the plot, as that is non-existent; it arises from a decision by the director, Vilgot Sjornan, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public.

The excerpts from the director's diary which were published in Sweden emphasize sex and the breaking away from old cliches about sex. The diary makes no mention whatever of any of the aspects of the film which it is claimed give it redeeming social value—the class structure in Sweden, ideas of nonviolence, and the like.

Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these

acts bear no conceivable relevance to any social value, except that of box office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest. Nor is it persuasive that the explicit sex scenes take only about 10 minutes out of 120. The enormous visual impact of a motion picture as distinguished from other media cannot be disregarded. Cf. Freedman v. Maryland, 380 U.S. 51, 61, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The combination of sight and sound, in the darkness of the movie theater, result in a uniquely forceful impact on the audience. Because of the nature of this medium, sexual scenes in a motion picture may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine. Cf. Landau v. Fording, 245 Cal.App.2d 820, 54 Cal.Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1967). Undoubtedly, the jury was aware of the difference between movies and other media when it found this film to be obscene.

But the majority would take away from the jury the power to pass on these not too difficult and complicated questions by saying that obscenity is "an issue of constitutional law" rather than an issue of fact with respect to which the jury's finding has its usual conclusive effect. To me this simply means that juries are not to be trusted where a majority of the judges disagree with them.

The action of the majority in nullifying the findings of the jury here goes beyond any case thus far decided in the obscenity area. No case is cited and I can find no case where the Supreme Court has set aside the verdict of a jury which has, under proper instructions, found present the three elements of obscenity as established by Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), and Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). There is no reason to suspect that judges are in any better position to pass

judgment on these matters than are jurors. Compare Mr. Justice Brennan's remarks in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448, 77 S.Ct. 1325, 1331, 1 L.Ed.2d 1469 (dissenting opinion):

> "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."[1]

With due deference to the very considerable intellectual attainments of my colleagues, I submit that when it comes to a question of what goes beyond the permissible in arousing prurient interest in sex, the verdict of a jury of twelve men and women is a far better and more accurate reflection of community standards and social value.[2] The

[1] See also Chief Justice Warren, dissenting in Jacobellis, 378 U.S. at 199, 84 S. Ct. at 1686:

> "[P]rotection of society's right to maintain its moral fibre and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the Roth test, I would apply a 'sufficient evidence' standard of review * * *."

[2] It is no answer that so-called "experts" testified to social value of the film. Neither juries nor appellate courts are bound by expert testimony. Compare Landau v. Fording, 245 Cal. App. 2d 280, 51 Cal.Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967), where the film Un Chant D'Amour was held to be obscene notwithstanding testimony in support of the film by seven expert witnesses.

When "expert" witnesses testify, as one did here, that a film such as I Am Curious has religious and moral significance, it is understandable that the jury pays little attention to their testimony. Cf. Transcript at 148-51.

jurors are drawn from all walks of life[3] and their less pretentious positions in the community qualify them to answer the questions put to them by Judge Murphy at least as well as circuit judges in their middle sixties who cerebrate in the ivory towers of the judiciary.[4]

It remains only to comment on Judge Friendly's tongue in cheek admonition to the exhibitors. They are cautioned that state authorities may still intervene if minors are admitted to see the picture or if the film is advertised to capitalize on nudity and sexual activity. All of which seems to me to amount to a concession that the entire public ought to be protected against the exploitation for profit of a film which a jury has outlawed for obscenity in violation of the federal statute. However, as the contrary view of my brothers has prevailed here, I join Judge Friendly in pointing out that state and local authorities may intervene if minors are admitted to the audience or if those who promote the exhibition of the film do so in ways which capitalize on the film's "extensive portrayals of nudity and sexual activity."

I would affirm the judgment of the district court which barred this film from importation.

[3] The records of the district court show that the jury in this case was made up of 7 men and 5 women who resided in New York City and its suburbs. They ranged in age from 32 to 68 years and engaged in widely varying occupations.

[4] Compare, Mr. Justice Black, dissenting in Mishkin v. New York, 383 U.S. 502, 515, 516, 86 S. Ct. 958, 968, 16 L. Ed. 2d 56 (1966):

> "But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read."

APPENDIX E

CALIFORNIA

(San Jose)—*Grove Press, Inc.* v. *Louis P. Bergna, et al*, No. 52300 (U. S. District Court Northern District of California)

COLORADO

(Denver)—*Grove Press, Inc.* v. *The State of Colorado, et al*, No. C-1677 (U. S. District Court for the District of Colorado)

(Denver)—*People of the State of Colorado, et al* v. *Sher Enterprises, Inc., et al*, No. C-12226 (District Court in and for the City and County of Denver State of Colorado)

GEORGIA

(Atlanta)—*Grove Press, Inc.* v. *Lewis R. Slaton, et al*, No. 13040 (U. S. District Court Northern District of Georgia Atlanta Division)

KANSAS

(Kansas City)—*Grove Press* v. *State of Kansas*, No. KC 2992 & KC 2997 (U. S. District Court for the District of Kansas)

(Kansas City)—*State of Kansas* v. *Motion Picture Entitled "I AM CURIOUS-YELLOW"*, *et al*, Nos. 6122 Div. No. 1 (District Court of Johnson County, Kansas.)

MARYLAND

(Baltimore)—*Howard Wagonheim, et al* v. *Maryland State Board of Censors*, No. 212 (Court of Appeals of Maryland)

MASSACHUSETTS

(Boston)—*Commonwealth of Mass.* v. *Serafim Karalexis, et al*, Nos. 43068-69-70-71 (Suffolk Superior Court)

(Boston)—*Serafim Karalexis* v. *Garrett H. Byrne*, Civil Action No. 69-665-J (U. S. District Court for the District of Massachusetts)

MICHIGAN

(Detroit)—Grove Press, Inc. v. Robert B. Blackwell, et al, No. 33369 (U. S. District Court Eastern District of Michigan Southern Div.)

MISSOURI

(Kansas City)—Herbert C. Hoffman v. Dickinson Operating Co., et al, No. 730169 Div. No. 7 (Circuit Court Jackson County, Mo.)

NEW JERSEY

(Livingston)—Joseph P. Lordi, Prosecutor v. United Artists Corp., et al, No. C-787-69 (Superior Court, Chancery Div. Essex County)

(Linden)—Leo Kaplowitz, Prosecutor v. Wood Plaza Theatres Corp., et al, No. C-829-69 (Superior Court, Chancery Div. Union County)

(Woodbridge)—Edward J. Dolan, Prosecutor v. United Artists Corp., et al, No. C-813-69 (Superior Court, Chancery Div., Middlesex County)

NEW MEXICO

(Albuquerque)—Grove Press, Inc., et al v. City of Albuquerque, et al, No. 8177 (U. S. District Court for the District of New Mexico)

(Albuquerque)—City of Albuquerque v. Tom Singleton, No. P412-9117675 (Municipal Court City of Albuquerque)

OHIO

(Cleveland)—Grove Press, Inc., et al v. John T. Corrigan, et al, No. 877845 Civil Branch

(Cleveland)—State of Ohio v. Dave Browdie, No. 93748 Criminal Branch

PENNSYLVANIA

(Philadelphia)—Grove Press, Inc. v. *City of Philadelphia*, No. 69-972, *City of Philadelphia* v. *19th and Chestnut Street Corp, et al*, No. 69-934, (U. S. District Court for the Eastern District of Pennsylvania)

(Philadelphia)—City of Philadelphia v. *19th and Chestnut Street Corp., et al*, and *Grove Press*, Nos. 17,955 and 17,956 (U. S. Court of Appeals)

VIRGINIA

(Norfolk and *Virginia Beach)—Grove Press, Inc., et al* v. *Andre Evans, et al*, No. 355-69-N (U. S. District Court for the Eastern District of Virginia, Norfolk Div.)

Commonwealth of Virginia v. *Kenneth Andrews*, (Municipal Court of City of Norfolk)

WASHINGTON

(Spokane)—State of Washington v. *National General Theatres, Inc.*, No. 194766 (Superior Court of the State of Washington in and for the County of Spokane)

(Spokane)—Grove Press, Inc., et al v. *Donald C. Brockett, et al*, No. , (U. S. District Court Eastern District of Washington, Northern Div.)

APPENDIX F

The Film:

The film was produced by a Swedish studio, Sandrew, and it was directed by Vilgot Sjoman, a protege of Ingmar Bergman. It presents a kaleidoscopic portrait of Sweden, portraying problems and tendencies in the contemporary social and political scene. There are two story lines which develop little by little and merge in the running of the film.

A middle-aged director (played by the film's actual director) and a young drama student (played by the film's main actress) are seen working on the film, "I Am Curious — Yellow and Blue," together. In the making of the film which became the "Yellow" version, the student grows interested in her young co-actor, and by the film's final sequence, leaves the director to go off with the actor. The actress who plays the drama student in the film being made also plays a young girl who lives with her father in a picture frame shop. The girl is disillusioned with her father who in his idealistic youth went to fight in the Civil War in Spain, but grew frightened and fled. She tries to carry out, in her own way, what her father failed to achieve, and much of the film is devoted to her efforts to gather knowledge about Swedish political and ethical attitudes, and her efforts to change some of these, particularly those which support the "class society" and "violent" military systems and methods of defense. The young girl is curious; in the course of the film she learns much about Sweden and herself. Some of what she learns makes her angry. She pickets and protests against some of the political and social situations, seeks sexual freedom of the sort enjoyed by men, and rebels violently against her boyfriend who conceals his love life with other women from her.

The film presents ideas concerning nonviolence. Another theme concerns ideas and attitudes regarding class society. The ideas are first presented somewhat abstractly, through interviews of men and women on the street, at the

airport, in their offices, at meetings, at an induction center, etc. Gradually, the themes are personalized: the ideas are shown as they work in and on the film's main characters, on Lena, the girl, Borje, the boy, and Rune, the father; and, also as they work on the director and the drama student.

"Is Sweden still a class society?" This idea is introduced in Lena's interviews, first on the streets, among faces in the crowd; then by her provoking questions in the Labour Movement headquarters; and by the interview with Olof Palme, who is a minister in the present Swedish government. This is immediately followed by the first human illustration, in the editing room. An aspect of the class society is that people use each other; they climb on one another to get ahead in their careers. The film director uses the drama student. She in turn uses the director. The idea of nonviolence is also introduced by interviews: first with the American Negro leader, Martin Luther King, Jr.; then by interviews with young men at an induction center. Soon Lena is taking action on behalf of the idea: making propaganda against military defense and preparing pamphlets on nonviolent techniques. She has an important idea of her own: Sweden should change from a standard military defense to a new type of nonviolent defense.

The class structure idea is further developed in Lena's protests and agitations. She criticizes "right-wing" persons, mocks the conservative paper of Sweden, asks the Russian Embassy if the Soviet Union has created a new sort of class structure. She questions the morality of Swedish tourists returning from Franco's Spain, interviews the old Swedish king (a symbol of the traditional class society); takes part in demonstrations against the U. S. war in Vietnam, expressing the contemporary Swedish disappointment in the American development. She discusses with the Soviet poet Yevtuschenko the problem of freedom and force in a starving world; societies with free enterprise system versus socialism; the American model versus

the Russian and Chinese models. The nonviolent-defense idea is developed by presenting the utopian idea as if it were already in practice. A nonviolent "sabotage" man is interviewed in his factory. Young people are shown training and exercising "socio-drama" at a railway track, along lines developed by Martin Luther King's movement. A decision by the Swedish parliament to change to nonviolent defense is presented through a TV news report.

While this reportage and these discussions go on, the film's ideas gradually develop so that we see how they work on the human level, in ordinary human beings; we see a series of clashes between personal dreams and reality. Thus, the father has not been able to carry out his socialist's dreams; reality has crushed him, he has resigned and escapes into inactivity, heavily sleeping, a wasted life. The boy, Borje, is trying to get ahead in the Swedish class society, voting right wing or liberal, leaving his job in a clothing shop in order to become an automobile salesman: a profession that offers him fine opportunities, tax-free income, and a white sports car for his personal use. Reality, however, is less kind: by the film's end, Borje is on the brink of being fired from his job. It is the relationship to Borje which brings Lena into her most difficult personal crises, with ideas and reality colliding.

In the beginning Lena doesn't know herself very well. She wants to be nonviolent, admiring Martin Luther King, but she has a great deal of anger inside her. She can be happily singing "We shall overcome", riding on her bike — until she is splashed with mud by a speeding car; then, she screams and swears. She can make herself an altar with a peace symbol, a broken gun; but when Borje arrives in his car, breaking up her religious-like retreat, and destroying her inner peace, she loads and fires the gun at him. Lena's development is a story of someone who becomes conscious about herself and her motives. This growth in awareness is painful. It is most vividly brought out by Lena's sexual involvement with Borje, an involvement

which is portrayed in a number of candid and explicit scenes where they make sexual love with passion (the scene in Lena's room), with humor (the scenes on the palace balustrade, in the old tree, and in the country pond), with savageness, anger and tenderness (the scenes immediately after the shooting and later in the empty cabin).

After their first happy time together, where no conflicts are apparent, the latent problems in the relationship of this young couple gradually appear and eventually explode, in a love scene. Feeling injured by his attitudes towards her, and her own inability to resist his appeal, Lena reacts against Borje, in hate and aggression. She has a fantasy which reveals a wish to kill him, and castrate him. That brings an important moment of self-recognition. Discovering the hate that is inside her, she again leaves Borje, and, while riding away, in another fantasy, speaks to her idol, Martin Luther King, and tells him she cannot be with him any longer. "You need people who can carry out your ideas without hate." Lena cannot. In a while, she cries like a child, and tries to comfort herself by gorging on pastries. At this moment, the TV broadcasts that the Swedish government has reached a decision to change its policy to one of nonviolent defense. Lena cries again, but this time with relief. The Idea is greater than she is. Even if she can't live up to it, the Idea is there and lives on: it can be carried further by others.

This is the moment in the film where the different ideas integrate in their most human way. From now on, until the end, the discussion is carried on at this human level, ending in the destruction by Lena of her own files. Having discovered the aggression inside herself, she acts it out: in the attack on her father, in the destroying of her archive, in the symbolic killing of Franco, the dictator. The two thematic ideas have been shown in inter-action: a world crying for social changes, challenged by the dream of nonviolence, confronted with feelings of the inevitability of violence.

APPENDIX G

Dr. Paul Yaffe, the State's first witness, explained that he is a full time employee of the Department of Education; that his field of study was "basically in education" where he earned his Ed.D. degree; that he holds no degrees in psychology; but that he has taken courses at various institutions in "the projective techniques and psychological techniques of the clinical psychologist" (E. 31, 39, 40).[1] He did not pretend to be knowledgeable in the area of films (E. 35)[2] and, at the suggestion of counsel for the State, he declared that he was "not an expert on motion pictures", but that his testimony would be based on his "expertise in psychology" as "applied to the motion picture media" (E. 36).

The witness said that he viewed the film on July 8, 1969 and that he "felt the dominant theme was sexual" (E. 40, 41). He reached his conclusion, he testified, by applying "a kind of yardstick that has been utilized by Drs. Phyllis and Everhard Kronhausen in determining what constituted pornography or obscenity from a psychological frame of reference" (E. 41). Asked whether the film presented "anything of socially redeeming value," he replied that "the socially redeeming situation is, in my opinion, shallow . . ." (E. 46). He added, however, that, "I want to say very candidly that when I first saw the film I was quite puzzled about what to do because I was impressed with the fact that there were all the earmarks of socially redeeming features", but, "on careful thought," he continued, he began to believe that he was "being taken in" (E. 46).

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[1] His course work was sufficient to qualify him to practice as a psychologist. He said that he has "maintained" his skills through private practice in the evening, agreeing with the characterization that he "moonlights in the psychology" (E. 40-42).

[2] The only reading on motion pictures which he could recall was part of a "catalogue" published by the Museum of Modern Art (E. 34-35).

"When did you first arrive at your first opinion that the film did have all the earmarks of socially redeeming value?" Dr. Yaffe was asked on cross-examination, and he answered, "As I was viewing it" (E. 47). After seeing the film, he testified, he left the screening room and had a discussion with Mrs. Margery Shriver, the Vice Chairman of the Censor Board. He told her, "that I was puzzled about this film because I felt it was not going to be an easy one to say yea or nay to" (E. 48). Asked specifically whether he had not told Mrs. Shriver "At the time of your first conference after you viewed the film, immediately afterwards, that you could not say it was utterly without redeeming social value?", he answered that he had told her that, "it was not clear" (E. 48). Mrs. Shriver then discussed the film with him, and, "When I left," the witness said, "I had agreed that I would be willing to testify" (E. 50). Counsel for the Appellants attempted to inquire into the substance of the conference that had converted the ambivalence into the final expression of willingness to testify, but counsel for the State objected to it as hearsay. The Court foreclosed the inquiry, sustaining the objection over the insistence of counsel for the Appellants that the questions were proper (E. 52, 53).[3]

[3] In his discussion of the substance of the film during cross-examination, Dr. Yaffe explained that in his view the film portrays "a kind of flitting about for causes." Asked whether "that doesn't amply describe a lot of our young radicals?" he answered "It may do so" (E. 70). The girl in the film, he said, was rebelling against many things (E. 78), and "she was constantly searching *for ways in which she could be supporting or extending* the idealistic move that her father had made many years ago" (E. 78, 79). In spite of her attempts to embrace nonviolence, her "complex" and multiple disappointments in her personal relationships ended in a violent "explosion" or "projection" against her father of "all of her accumulated disappointment" (E. 80-1). The development of this story, the witness conceded, is "valid psychologically" and it is the sort of thing that he sees in his own part-time practice (E. 81).

The cross-examination of Dr. Yaffe also produced disclaimers of the very elements on which his psychological analysis was said to have been based. He acknowledged, for example, that the essential elements of voyeuristic appeal were absent from this film and that it is made clear to the audience that they are not witnessing real sexual activity but that they are only witnessing "make-believe scenes" in a play (E. 43, 44, 56, 57, 61). He also admitted that he had been in error with respect to essential facts on which his conclusion had been founded and he sought to excuse his inability to recall accurately what the film had portrayed by saying that he was "hopelessly confused" and that the film "hasn't stuck" with him "too well" (E. 55, 57).[4]

Dr. Yaffe also displayed a remarkable unfamiliarity with the authorities on whom he had thought he was relying. He confessed that he had never read the Kronhausens' text but only a chapter which they had contributed to an encyclopedia (E. 65). After he agreed that the film contained "a preponderance of material other than the sexual material" he added that he had never timed the sexual material because "from my point of view it is irrelevant" (E. 86). When it was read to him that the Kronhausens have said that a work, to act as an erotic stimulant upon the spectator, "must not tire him with superfluous non-erotic descriptions of scenery, character portrayals or lengthy philosophical expositions," he admitted that he had never heard that thought expressed "in this form before" (E. 65).[5] Other excerpts from the Kronhausen text

[4] He had emphasized that the film "carefully avoids" unpleasant "after effects or side effects of sexual relationships", only to admit later that the sexual activity of the characters had resulted in their contracting scabies and having to be deloused at a DDT center (E. 45, 54).

[5] The Kronhausen comment was directed specifically toward erotic literature. Asked whether it would not apply to movies as well as books, Dr. Yaffe answered, "Well, I think so" (E. 67).

were read to the witness, and they evoked such responses as, "I would say I have not heard it, and what I am really thinking about is whether I would subscribe to it" (E. 78).

The State's second witness was Reuben Kramer, a sculptor, who was tendered as an expert on the existence or absence of "redeeming value" in the movie (E. 89). He conceded that he is not an expert in "the cinemagraphic art medium" or even a movie goer (E. 90, 91).[6] Mr. Kramer was permitted, over objection, to express the opinion that the film was "inartistic" (E. 116). Asked to give the reason for his opinion, he said that he had reached that conclusion, "for the simple reason when you have a sex scene like that, which has been so — shown in such a debased form as to expose it in public without any artistic merit whatsoever, to me that has contaminated the picture" (E. 92). "(R)egardless of what message the film had," he elaborated, "this has contaminated the picture to such a degree where I think it is a parallel with Dr. Yaffe's statement that if you have a glass of water with only one microbe in it, the water is not good any more because it has been contaminated" (E. 95).

To the question, "What did you think of the quality of her acting performance as a form of art?" Mr. Kramer replied, "That was the most realistic bit of acting I ever saw. She certainly must know her business" (E. 107). When asked other questions about the artistic aspects of the picture, this witness begged off, saying "I am not qualified to judge whether they were doing a good job artistically" and, "If it is discussing the quality of the movie, I am not qualified" (E. 112). Mr. Kramer also made it clear that in his testimony he was "absolutely not" expressing any opinion "as to the relationship of the depiction of sex to the development of the characters" in the film or "to the development of the idea that the director was

[6] He said that he has "no interest in the art of such people as Godard . . . Fellini . . . or Bergman" or in "the artistic talents of directors" (E. 91).

trying to convey" or to "the relationship between the sex scenes and the political or moral viewpoint that the director may have had" (E. 117-118).

When asked whether he would say that the picture would have artistic value if the sex scenes were removed, Mr. Kramer replied that, "I would say probably it would have been a nice movie" (E. 96), "a movie I might go see myself if I had the time" (E. 96). The full extent to which these comments constitute praise of the film was made clear later in Mr. Kramer's testimony when he was asked, "Isn't it true that you have expressed the opinion in the past, in this Court, that in your view very few films have any artistic value?" and he answered, "I guess so. It sounds like I might have said it." There was read to Mr. Kramer his testimony in another case in which he said, "Very few films do [have artistic value] . . .; they are just stupid." When he was asked whether he remembered making that statement, he said: "I very likely could have made it. I wouldn't make it in reference to this. This is not stupid" (E. 105).

John Henry Lewin, Jr., Esq., the State's third witness, is a practicing lawyer and an associate in Venable, Baetjer and Howard, a Baltimore law firm (E. 125). For a period of about two years, until April, 1968, while he was an Assistant State's Attorney, he devoted approximately ten hours per week to the review of material of questionable obscenity and he prosecuted six or seven obscenity cases (E. 127-128). In his review of these materials, Mr. Lewin testified, he would "apply the three tests of the Roth case:" he would "make some determination as to whether or not the dominant theme or intent of this material appealed to the prurient interest;" he would "make some evaluation . . . as to whether or not the material was utterly devoid of redeeming social value"; and he would make some determination as to whether the material exceeded contemporary community standards in the depiction or representation of sex (E. 130-132). In the past year, the private practice of law has occupied fifty to sixty hours of each week of his

time, and, consequently, he said, "I don't make it a purpose to try and keep current on what is actually showing" (E. 132).[7]

He saw the film, Mr. Lewin said, at the request of Mr. Biddison, his friend (E. 147, 159). He could not recall the date of the viewing or whether it was before or after the Board had acted. Mr. Lewin was allowed to express his opinion that "there are portions of that film which go beyond the contemporary community standards in depicting sexual matters," and he specified these as the two sex sequences which take place on the retreat, the one on the grass and the other in the barren house, and the scene of "a dream fantasy" in which the girl "imagines herself castrating" her lover who has left her (E. 146-147). Except for these "three scenes," he repeated, the film did not exceed contemporary standards (E. 153). The community standards were generally the same, he thought, in "urban areas such as Baltimore, New York, San Francisco, Los Angeles . . ."

When Mr. Lewin was asked on cross-examination whether he has not expressed the opinion that he does not, himself, "find it [the film] to be offensive," counsel for the State objected, insisting that "Any opinion he might have as to the whole movie is irrelevant and it is just, your Honor — it doesn't have any place in this trial" (E. 150). The objection was overruled and the witness answered that he has expressed that opinion on more than one occasion (E. 150-151). Later on, at the request of counsel for the State, the trial judge reversed his original ruling and struck the answer (E. 162-163). Mr. Lewin was also asked whether it was not true that he had not also "expressed

[7] He was unfamiliar, he agreed, with many of the shows currently on the Broadway stage, and he had not seen such films as "I A Woman, Part II," which had been advertised in the Evening Sun of July 11, 1969, as "Ten Times More Than 'I Am Curious (Yellow)'" and "Sweden, Heaven and Hell," which had been advertised in the Evening Sun of July 16, 1969, as "More Provocative Than 'I Am Curious (Yellow)'" (E. 133-134, 135-136).

the opinion that the dominant theme of this movie is not an appeal to the prurient interest" (E. 151). The Court sustained an objection to the question, and counsel for the Appellant proffered that "(I)f this witness is permitted to answer the question he will testify to your Honor that he has expressed the opinion that the dominant theme of this material, this film, taken as a whole does not appeal to a prurient interest in sex" (E. 151). Finally, he was asked if it was not true, "that you have expressed the opinion that the material in this film is not utterly without redeeming social value," and, when the objection to this question, too, was sustained, counsel for the Appellants proffered that "that if this witness were permitted to answer the question, he would testify that, in his opinion, the material or the film is not utterly without redeeming social value" (E. 152). If Mr. Lewin were to be recalled to the stand as a part of the defense case, the Judge said, his ruling with respect to these questions would be the same (E. 163).

The State's last witness, tendered as an expert "in the field of literature," was William S. Forshaw, an employee of the Enoch Pratt Free Library (E. 164). Mr. Forshaw testified that he holds a master's degree in library science and that his function, as a senior subjects specialist in the humanities section, is "helping the public select material in the field of poetry, drama and also administrative duties, such as time schedules and so forth" (E. 165). He is not in the Pratt film department (E. 168). He is "interested in the preservation of the American film," and, in pursuit of this interest, he has acted, in an "extra curricular" capacity as a consultant to the Baltimore Museum of Art (E. 165-166). He said that he was also interested in films from the "international viewpoint," and, he emphasized, "I am largely concerned with the critics' reaction to films" (E. 165-166).

He viewed the film, Mr. Forshaw testified, at the request of the State when the trial was already in its second day (E. 187-188). In response to questions on direct examina-

tion, he voiced the conclusions that in his view "the dominant theme of the movie is sexual"; that he "believed" the film exceeded contemporary community standards in the depiction of sexual matters (E. 172, 175). When asked on cross examination, "Now would you say that your view as to what you think is the dominant theme, for example, would differ from the majority view of those people who are in your profession?" he conceded that, "On the basis of those who, among my colleagues and friends, have seen the film, I would say there is a small percentage so far — I am trying to say that I believe that I am in a minority in this instance" (E. 221). And further, to the question, "And would you also say that your opinion with respect to the existence or non-existence of socially redeeming value, literary, artistic value, is a minority opinion among your colleagues?" he answered, "Among those who have seen the film, yes. I cannot speak for everyone I would have in mind" (E. 222). Asked whether he would name some of those professional colleagues who had expressed views favorable to the film, he said that he "would prefer not to" (E. 221).

In connection with his expressed "concern about the critics' reaction to films," Mr. Forshaw said that he reads the reviews of Hollis Alpert in the Saturday Review and that he recognizes him "as a competent critic"; that he reads the reviews of Stanley Kauffmann whose judgment he values and who had made a "worthwhile contribution" to the film literature and is "a good critic"; that he "values the judgment" of John Simon; and that he regards the judgment of Richard Schickel, the film critic for Life Magazine, "as being a judgment of value in the criticism of films" (E. 169-170). Before testifying, the witness said, he had not known that Messrs. Alpert, Simon and Kauffmann had "expressed any opinion with respect to this film," and, although he understood that Mr. Schickel had written a review, he had not read it. When he was shown the reviews that these men had written, and when he discovered that they were favorable to the film, his reactions varied from

admitting the "possibility" that they were correct to disagreeing with them (E. 181, 188-189).

Mr. Forshaw had testified on direct examination that some time ago he had read the diary of the making of the film which the director, Vilgot Sjoman, had published and which is entitled, *I Was Curious*. It developed on cross-examination that he had read the book as a prospective selection for the Pratt Library; that he had recommended that the library buy it; and that he thought that "it had something to say about the films" and "about the serious techniques of film making" (E. 240). He also agreed that in this instance the director "was attempting to make a legitimate film" and that the director "is a serious student of the . . . European film makers" (E. 185-186).* The 7 East Theater in Baltimore, where this film is proposed to be shown, Mr. Forshaw testified, is commonly known as an "art theater" (E. 211). The films shown there, he said, are best described as "more intellectual" or "avant garde" (E. 212). It would be fair to say, he continued, that it is not a theater that "caters to the gum-chewing, popcorn-eating crowd" (E. 213).

After Mr. Forshaw had commented upon the psychological, political and sociological aspects of the film, and

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* At one point, at the suggestion of counsel for the State, Mr. Forshaw said that he saw some of the "techniques" of stag films in the film in question. Asked to explain, however, he said that he noticed that the girl and boy characters are shown in a scene with the top of the automobile coming down over them, and he remembered having seen a stag film in which "the couple get back into the car and this is supposed to be the end of the film" (E. 175-176). He has seen other films in American film theaters, he said, that remind him of stag films (E. 208). In his entire life, he said, he had seen five stag films, the last of which was in 1954 (E. 190). It never occurred to him to determine how much time in the subject film was devoted to sexual matters (E. 190), and he catalogued the many ways in which the present film is not at all like a stag film (E. 196-198). He also said that he thought that the director in this case "copied other techniques" of the well known French director, Jean-Luc Godard and those of a director known as Bunuel (E. 174).

after counsel for both sides had announced that they had no further questions, the Court conducted an inquiry. In answer to the Judge's question, Mr. Forshaw said that the story and the political and social commentary in this film could not have been depicted without sexual scenes. The sexual material in this film, he continued, is important to the expression of the director's commentary on nonviolence, politics and social issues." He also acknowledged that he has noticed "a tendency toward greater candor in the representation of sexual matters in recent years" and that "there are shows now being shown on the Broadway stage, live, with live casts, that are at least as explicit and perhaps more explicit than what is shown in this film that is involved in this case" (E. 213, 214, 216).[10]

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[9] "(The Court) I have just one. Whatever the story is, if there is a story—political, social or whatnot—could it have been depicted without these sexual scenes?

(Mr. Weiner) Objection.

A. No.

(Mr. Biddison) Did you understand the question?

(Mr. Weiner) Objection withdrawn.

(The Court) What?

(Mr. Weiner) I withdraw my objection.

Q. (The Court) Well, let it stand with an objection and I overrule the objection, and then let the record show if you want to withdraw it. Go ahead. Why does it have to be? Why does it have to be told in terms of sex? A. Because the director admitted in his diary concern with this aspect of his own private relationship with the actress.

Q. (The Court) Why do you have to express violence, nonviolence, politics, Vietnam, what-have-you, various conglomerations of things that show up, I would suggest, at random in the picture—why does that all have to be expressed in terms of sex? A. I do not know. It is though." (E. 241-242).

[10] The witness said that he had just recently seen a show entitled "Oh, Calcutta!" on the Broadway stage and that he had seen this show for pleasure (E. 226). This show displays both male and female nudity, with the genitalia fully exposed; 75 percent of the show is performed in the nude, and there are included in it acts of simulated intercourse and masturbation (E. 227). The witness said that he enjoyed that show and that he thought that it had artistic value (E. 227-228).

APPENDIX H

Dr. Richard A. Macksey, Acting Director of the Humanities Center, Johns Hopkins University, was the first witness to testify on behalf of the Appellants. He has taught more than a dozen different courses about films and filming, including courses in film history, theory, esthetics and drama (E. 244-245). He has published books and articles on literature and film criticism and he has conducted a radio program on the CBS network relating to art and film review. He has been an editor for the film journal entitled "Film Heritage" (E. 247-248), he has lectured widely on the subject (E. 245-246), and he is a member of the board of the Maryland Film Festival (E. 248). His reading has included books published on the film in four foreign languages, he subscribes to five periodicals on the film and he regularly reads the reviews of respected critics. He sees more than 100 films a year, half of them foreign films (E. 248). He has looked at films for the State Board of Censors and he has been consulted by the State's Attorney for Baltimore City for his opinion with respect to possible obscenity (E. 248-249).

The film "I Am Curious (Yellow)" should be understood, he testified, in the context of the "film makers in Sweden" who have made an "enormous contributions to films" (E. 252-253). In the shadow of Ingmar Bergman, the master director, he said, there have worked a number of younger film makers, "notably" Sjoman (the Director of "I Am Curious") and Widerberg (E. 252-253). Sjoman, who had been a "rather successful" and "serious" novelist[1] is also "a serious film maker" (E. 261). He has looked to those French directors, such as Cris Marker and Godard, who had been experimenting with "documentary techniques," and he has attempted to incorporate those techniques into his use of the film as a vehicle for social expression (E. 253).

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[1] He has also written an "interesting series of articles" critical of Hollywood and its techniques (E. 261).

The film in question here, Dr. Macksey, explained, explores social attitudes by raising many questions. It is concerned with "conflicts between generations," with "the kind of malaise of the so called welfare state in Sweden, the ostensible classless society" with "the doctrine of non violence as this relates to Sweden's peculiar role in Europe" and with "the face of reality" (E. 254). The inner story is "chosen not to turn away from the social and political issues, but to implicate them" (E. 257-258), and it is "not just a crutch for a few sex scenes" (E. 258). The social commentary is presented, for artistic reasons, in an "irreverent and abrasive" fashion (E. 255, 313). The film, he continued, has social value (E. 267) and it possesses artistic merit (E. 321). In particular, "The editing, I thought, was quite brilliant" (E. 215), and, "The editing principles were artistic and not commercial" (E. 255). "At its best," the film is "comic and irreverent," and, "At its worst, it is just terribly serious" (E. 262).

Dr. Macksey also testified that the film would appeal mostly to the person who attends "art houses" and enjoys foreign films. The 7 East is just such an "art house," he testified, and it is one of the places where "over the years" there have been shown "most of the foreign art films in town" (E. 265). He said that this film fits in with the kind of art pictures that are generally shown at the 7 East (E. 265-266).[2] He added that the organizational principles of the film might perhaps not be entirely clear "to someone who hasn't seen some of the films that filth makers made in the last four or five years" (E. 311-312), but that even such a person, if he were "average", would not fail to perceive life's "complexity of relationships" and the "identity crisis" of the girl in the inner story (E. 312).

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[2] It is "unfortunate", he commented, that those who have sought to censor the film have given it such "billings" and "publicity", for it has been given "more notoriety than it would have had, had it simply appeared as an ordinary picture" (E. 285). "(I)f it hadn't been for the statements made by those who had censored the film, it would probably long since have closed in New York" (E. 272).

Sex is not the dominant theme of the film, Dr. Macksey explained, and "the number of scenes where there are naked bodies on stage is probably only about six minutes" (E. 287). The sexual scenes are brief, the one on the grass lasting only about 70 seconds (E. 282), and they are presented with a number of "distancing effects" such as constant interruptions, so as "to remind the audience that this is not life, but a film about a film being made about life" (E. 257).[3] "I think," he observed aptly, "that the time it takes you in some cases to describe some of these acts might be longer than the actual presentation on the screen. This is one case where I'm not sure one can say talking about or describing something is not more provocative than showing something" (E. 291). This film, he said, is "much less suggestive and leering than a great many films that show a few square inches less of anatomy." (E. 266). The sex scenes are artistically justified (E. 321), they were included in this film in the valid exercise of the director's artistic judgment (E. 323), they are related to the rest of the picture (E. 258, 274) and if they were to be removed the film would be "pretty spotty" and would "verge on incoherence" (E. 317-318).

The next witness was Dr. Lincoln F. Johnson who, "for approximately a decade" has been chairman of the Fine Arts Department at Goucher College (E. 327). He has been engaged in the serious study of motion pictures for 18 years and motion pictures have been his primary subject of study, research and teaching for "the last six or eight years" (E. 327). He regularly teaches courses in the history of motion pictures and film production (E. 327).

[3] The film would not be stimulating, he said, except to the most "sexually deprived person" (E. 285, 294). A person who went to see this film "for reasons of sexual stimulation" would reach "maximum frustration as far as what he wasn't seeing in the film" (E. 297). This film, he said, "has less obsessive concern with sex and suggestive representation of some of the things you describe than a number of other films shown commercially," and "There is much greater emphasis on perverted sexual acts in 'The Killing of Sister George'" (E. 313).

He has served on the jury of selection for the American Film Festival (E. 327). He sees "between 100 and 150" *feature length films* a year, and a great many shorter films as well (E. 328). He has appeared as an expert witness for the State in the Criminal Court of Baltimore City with respect to pornography E. 328).

He viewed the film in question here and, he said, "It is a film, in my mind, of exceptional merit" (E. 340). He also described it as "a very significant, historically important film" (E. 318). "It has cinematic merit" he continued "in a number of ways" (E. 335). In its structure, "Sjoman recognizes that in looking at life, or in experiencing life, things don't fall into neat categories and developments . . . that there is a constant bombardment, if you will, of our senses and of ideas from all directions" (E. 335). "What I find very, very beautiful about the structure of this movie is that the structure itself reveals this lack of clarity, while maintaining a form of clarity" (E. 335). The film is made as "an attempt to grasp . . . this . . . very quality of life" (E. 335). This film, he finds, "is rythmical, like a piece of music, which a good film, in my mind, should be, so that he has given normal order to this expressed disorder" (E. 336). The film is also unusual in its intertwining of documentary material with fictional material and its weaving of the director's "personal experience into the experience of the culture as a whole" (E. 336-337).

The dominant theme of the film is not sex, he said. The film explores "the state culture . . . in its broadest interpretations" and "with great integrity probes current opinions". It is concerned with "the unthinking acceptance of traditional values", the theme of violence versus nonviolence "in both public and personal life;" the "relationship of an individual personality to the social structure" and "it is an examination of the generation gap" (E. 332-333). Social attitudes are explored not only through the interviews and scenes of demonstrations "but also through the conversations of Lena, through . . . the development of her particular character" (E. 333).

The integration of the sexual theme with the others, Dr. Johnson said, is one of the "very interesting accomplishments of Sjoman" (E. 334). He has used the material as a means "of revealing a character", to reveal "a great deal about personal attitudes and about social attitudes" and "it is in a large part through the sexual activity that Lena begins to discover what she actually is". Summing up the relationship of this material to the film, he said that, "Sjoman, it seems to me, has dedicated himself with the greatest integrity to presenting an honest picture and, I think, an honest picture of Sweden and of youth and of humanity, and I think that if he were to cop out on the sexual theme the film would lose a great deal of its integrity, so that directly and indirectly these sexual themes or sexual scenes are important to the whole process of the development of the movie" (E. 335).[4]

Dr. Johnson contrasted the honest portrayal of sex in this film with other films which might better be classified as pornography, at least one of which was then currently playing at the Uptown Theater in Baltimore. After describing how that movie, entitled "Sappho Darling", "was concerned from the beginning to end with sex,"[5] he stated

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[4] This film fits in well with the other films of merit and foreign origin, he said, which are generally shown at the 7 East. The 7 East, he commented, for its choice in foreign films has had "a tremendous cultural influence in this community for the good" (E. 340).

[5] In "Sappho Darling": "You were never allowed to forget sex, except for one moment when one of the ladies involved recited 'Now I lay me down to sleep', an ironic intrusion. In this film there was a gang rape by five men who chanted during this rape 'Gang bang; gang bang; gang bang.' There were three or four representations of orgasm. There were three representations of sexual intercourse. Males and females both handled and kissed female breasts. There was again a simulated cunnilingus. In addition to the gang bang, there were two attempted rapes. There was lesbian activity. The vocabulary that was used can be exemplified by one or two words—cock teaser, AC-DC" (E. 338).

that, "Now, quite frankly, I find it very, very difficult . . . to comprehend how the Censor Board can pass a vulgar meretricious exploitation movie like this and cause trouble with a serious film by a serious film artist on social themes like 'I Am Curious (Yellow)'" (E. 338). Similar films which have also played in the Baltimore area, were described by the witness (E. 336-337). The sex scenes in "I Am Curious (Yellow)", Dr. Johnson related, are presented with "almost clinical naturalness" and the director's techniques contrast sharply with the cutting, music, lighting, "frumpery" and "phony build-up" that are the tools of the pornographer (E. 339). "Sjoman acts in a manner that is honest" but he is careful in every case, in depicting a sexual scene, to divert the attention of the audience (E. 339).

Dr. James Mackie, Chief of the Division of Clinical Psychology of The University of Maryland Medical School, testified as to the psychological impact of the film. He has participated in research programs with respect to sexual stimulus on individuals, including a study relating to the influence of projective material on sexual arousal and fantasy of normal people (E. 375-376), and he teaches courses in sexual behavior and projective techniques to psychologists and graduate psychiatrists (E. 372-373).[6] He reviews sexual research material and writes articles on new areas of sexual investigation. The dominant theme of the film, Dr. Mackie said, is not an appeal to a prurient interest in sex, and the film would not be arousing to the average person.

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[6] He has also served as consultant in psychological problems to the Peace Corps, Vista, the Governor's Committee on School Problems and The Baltimore City Department of Welfare (E. 374). He has been the Managing Editor of the Journal of Nervous and Mental Diseases (E. 373-374). He has also been a consultant to WJZ-TV in Baltimore on programs appropriate for children (E. 374). Before holding his present post, he was Chief Psychologist in the Division of Child Psychiatry at the University of Maryland Medical School for three years.

For a motion picture to be sexually arousing "there are certain characteristics which must be part of the presentation of the sexual scenes" (E. 377). Those characteristics are absent from "I Am Curious (Yellow)", he said, and he explained his answer in detail.[7] He was thoroughly familiar with the Kronhausens' work, which had been mentioned by the witness Naffe, and he described how the material which is obscene under the Kronhausen test is "flagrantly" and "dramatically" different from the material in this film (E. 404). The film is simply "not pornography" (E. 383). The portray of the sexual behavior, moreover, is "consistent with the themes of the film" and "the important thing" is that the sexual portrayal makes "cohesive psychological sense" (E. 405). "Both of the chief characters, the hero and heroine, are quite fully developed," the "sexual portrayal of the characters is integrated in with the portrayal of their other aspects," and "the sex act in this film was always part of the complexities of the relationships between the two people" (E. 378, 381). The average person would understand "the psychological connection" between the sexual scenes and the rest of the film (E. 409).

Dr. Anke A. Ehrhardt, Instructor in Medical Psychology in the Department of Psychiatry, Johns Hopkins Hospital, agreed fully with Dr. Mackie's evaluation of the film. Dr. Ehrhardt, who is engaged full time in the treatment and study of behavior as it relates to sex, and who is familiar

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[7] One method of prurient appeal, absent here, is the use of such highly suggestive techniques which "permit the viewer to fill in with his own fantasy" (E. 378). In a frankly pornographic film, the characters are presented "in single dimension" and "there is a general effort to streamline all of the action to emphasize the sexual act. Here, on the other hand, the characters "are quite fully developed as rounded individuals" (E. 378). The film avoids prurience by the manner in which the characters are presented, the manner in which their acts are portrayed and the focus, emphasis and development of the sexual material in general (E. 378, 379, 399-401).

with the latest work which has been done on the erotic stimulation of films, similarly expressed the opinion that "I Am Curious (Yellow)" does not appeal to a prurient interest in sex in the average person (E. 518).[8] She explained, first, "that the sexual scenes and the sexual aspects of this movie are subordinate to a much larger concern of this movie" (E. 518), the much larger concern being the political, sociological, philosophical and "interhuman" development of "self-identification" (E. 519). The sexual material is presented in a manner so that it is not "erotically arousing" (E. 519). The sexual activity of the girl character, Dr. Ehrhardt agreed, "is very consistent with the other aspects of her personality" and it is an "important" part of her development (E. 519, 527). Even in the most explicit scenes at the retreat, which were emphasized by the State, "other aspects of their relationship, the human relationship between these two people, were much more dominant . . ." (E. 521).

Dr. Peter Rossi, a sociologist and Chairman of the Department of Social Relations at Johns Hopkins University, also testified. He was, for twelve years the director of the National Opinion Research Center at the University of Chicago (E. 410). He has acted as a consultant in sociology to three Presidential Commissions, and, most recently, to the Commission on Pornography which was established by the Congress (E. 410). Dr. Rossi testified that the film "has social significance" and that it portrays "the kind of struggle for a new way of life being expressed by young people throughout the world in a variety of ways" (E. 412). The film is concerned with the "false and hypocritical distinction" between public and private life, and it teaches that "one should search for honesty, not merely in public life, but also in private relationships" (E. 412). The girl

[8] She has lectured on the psychology of sexual behavior at universities and hospitals throughout the world (E. 516) and has published extensively on the subject of the psychology of sex (E. 516-517).

character is "very much" a "believable person in the light of today's younger generation," he related (E. 413-414). "It seems to me", Dr. Rossi said, "the sexual theme is part of the whole web of the story which the director is trying to put across" (E. 413). Although he does not think it is the "dominant theme" of the film, the sexual material is "important" and "an integral part" of it. "It would be not quite an honest picture," he thought, "if the sex theme did not appear there" (E. 414).

Space limitations do not permit a more detailed review of the testimony of the other witnesses who spoke of the film's merit. Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland, whose specialty is "dramatic literature" and "theater arts" (E. 487-488), said that the film has artistic merit (E. 490); that sex is not the dominant theme or even one of the predominant themes (E. 489-490); and that the sexual sequences were related to the predominant themes, particularly to "the girl's search for herself and meaning and her relationship to life about her" (E. 490, 492). And, continuing: "I would say that I didn't feel that any scene was superfluous or should be excluded. The film as such was an artistic whole, and I wouldn't have tossed out anything. I was not looking at anything that shouldn't have been there, any scene that wasn't excessive. By excessive, I mean in excess of what was needed to make the point" (E. 493). Dr. Ronald H. Paulson, Chairman of the English Department, Johns Hopkins University, an expert in literary criticism, is interested in films as "the really exciting contemporary art form," and he sees an average of two a week (E. 434, 435). "Sex is one of a number of themes" in the subject film, he said, but it is "by no means the dominant theme" (E. 439). It is ". . . one small aspect . . . but an essential one" (E. 439). "I Am Curious (Yellow)", he concluded, is a film "certainly with artistic, esthetic merit" and also with social merit because "it is dealing with important social problems" (E. 440). In including the sexual se-

quences, the director's "intention was honesty"; and they are handled technically by him "to destroy the erotic effect" (E. 443).

Jaromir Stephany, Chairman of the Department of Photography and Films at Maryland Institute, has viewed films regularly as an expert for the Censor Board and has testified three times on their behalf (E. 432).[9] The film in question here, he said, is a product of a serious effort (E. 537), and it is "rather strongly put together" (E. 538). It has artistic value and "is certainly one of the outstanding films" of the year (E. 538). It is most easily understood by "younger adults" (E. 438). Sex is not the dominant theme, he said, but the sexual material is important to the film. "In other words", he concluded "if these were cut out or modified in any way, the film would be destroyed" (E. 535).

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[9] He teaches courses in the making, history and esthetics of film (E. 531). He also has been Curatorial Assistant of the George Eastman House, one of the three archives of films in the United States (E. 531). He has a master's degree in fine arts (E. 532).

APPENDIX I

Cities Where "I Am Curious (Yellow)" Is Playing or Has Played as of November 5, 1969

ALABAMA
Birmingham

ARIZONA
Phoenix

CALIFORNIA
Berkeley
Concord
Los Angeles
Oakland
Palo Alto
Riverside
Sacramento
San Bernadino
San Diego
San Francisco
San Jose

COLORADO
Denver

CONNECTICUT
Bridgeport
Hartford
New Haven
New London
Norwich

DISTRICT OF COLUMBIA
Washington

FLORIDA
Miami Beach
Palm Beach
St. Petersburg

HAWAII
Honolulu

ILLINOIS
Chicago

MAINE
Bangor
Portland
Waterville

MASSACHUSETTS
Boston

MICHIGAN
Detroit

MINNESOTA
Minneapolis

MISSOURI
Kansas City

NEVADA
Las Vegas
Reno

NEW JERSEY
Atlantic City
Lakewood
Oaklyn

NEW MEXICO
Albuquerque

NEW YORK
New York City
Utica

OHIO
Cleveland
Columbus

OKLAHOMA
Oklahoma City

OREGON
Eugene
Portland

PENNSYLVANIA
Philadelphia
Reading

TEXAS
Houston
San Antonio

VERMONT
Burlington

VIRGINIA
Norfolk
Virginia Beach

WASHINGTON
Seattle
Spokane
Tacoma

APPENDIX J

Article 66A, Maryland Stat. Ann.

MOVING PICTURES.

§ 1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by means, devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, § 1; 1939, § 1; 1924, § 1; 1922, ch. 390, § 1; 1941, ch. 28.)

§ 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, § 2; 1939, § 2; 1924, § 2; 1922, ch. 390, § 2.)

§ 3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective

terms to be designated by the Governor. (An. Code, 1951, § 3; 1939, § 3; 1922, ch. 390, § 3; 1939, ch. 430.)

§ 4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, § 4; 1939, § 4; 1924, § 4; 1922, ch. 390, § 4.)

§ 5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, § 5; 1939, § 5; 1924, § 5; 1922, ch. 390, § 5.)

§ 6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) *Board to examine, approve or disapprove films.* The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) *What films considered obscene.*—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) *What films tend to debase or corrupt morals.* For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) *What films tend to incite to crime.* For the purposes of this article, a motion film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit forming drugs. (An. Code, 1951, § 6; 1939, § 6; 1924, § 6; 1922, ch. 390, § 6; 1955, ch. 201.)

§ 7. Certificate of approval or license.

Upon each film which has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. . . . ." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statement shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued

by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by § 11 of this article, to issue a duplicate certificate of approval. Any certificate or license issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, § 7; 1939, § 7; 1924, § 7; 1922, ch. 390, § 7; 1929, ch. 555, § 7.)

§ 8. Record of examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, § 8; 1939, § 8; 1924, § 8; 1922, ch. 390, § 8.)

§ 9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, § 9; 1939, § 9; 1924, § 9; 1922, ch. 390, § 9; 1945, ch. 66.)

§ 10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall, upon entering the performance of his duties, be covered by a surety bond in accordance with the provisions of §§46 through 50 of Article 78A of the Annotated Code of Maryland. (An. Code, 1951, § 10; 1939, § 10; 1924, § 10; 1922, ch. 390, § 10; 1927, ch. 46; 1945, ch. 400; 1967, ch. 703.)

§ 11. Fees.

For the examination of each and every one thousand feet (1,000) of original motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot. For the examination of each original set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of

§ 7 of this article; and the Board shall account for and pay all fees received by it into the State treasury. (An. Code, 1951, § 11; 1939, § 11; 1924, § 11; 1922, ch. 390, § 11; 1929, ch. 555, § 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720; 1965, ch. 598.)

§ 12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City of Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of the members of the Board; each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, § 12; 1939, § 12; 1924, § 12; 1922, ch. 390, § 12; 1941, ch. 727; 1947, ch. 257; 1960, ch. 47; 1961, ch. 96.)

§ 13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, § 13; 1939, § 13; 1924, § 13; 1922, ch. 390, § 13.)

§ 14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to pre-

vent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, § 14; 1939, § 14; 1924, § 14; 1922, ch. 390, § 14.)

§ 15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, § 15; 1939, § 15; 1924 § 15; 1922, ch. 390, § 15.)

§ 16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, § 16; 1939, § 16; 1924, § 16; 1922, ch. 390, § 16.)

§ 17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes

or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, § 17; 1939, § 17; 1924, § 17; 1922, ch. 390, § 17.)

§ 18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employe of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, § 18; 1939, § 18; 1924, § 18; 1922, ch. 390, § 18.)

§ 19. Review and approval or disapproval of film by Board; judicial determination; appeal; sale, exhibition, etc., of film without approval and license.

(a) Any film duly submitted to the Board for examination and licensing shall be reviewed and approved within five (5) days, unless the Board shall disapprove such film under the provisions of § 6 hereof, in which event the Board shall, within not later than three (3) days thereafter, apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene, or tends to debase or corrupt morals, or incite to crime, within the meaning of § 6 hereof. Notice of such application shall be

forthwith sent by first-class mail, postage prepaid, to the address of the person presenting such film for licensing. The Circuit Court for Baltimore City shall, within five (5) days after the filing of said application, conduct a hearing, and shall in connection therewith view such film; within (2) days after such hearing said court shall enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said § 6 hereof. If the decree and order disapproves said film as being in violation of the provisions of § 6 hereof, then the person presenting such film for licensing may appeal such determination to the Court of Appeals of Maryland, in accordance with the Maryland Rules of Procedure, and said Court shall advance such case on its hearing calendar to the earliest practicable date; and, in reviewing the order appealed from, said Court shall view the subject film. The burden of proving that the film should not be approved and licensed shall rest on the Board.

(b) Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a magistrate or the Municipal Court of Baltimore City, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the magistrate or judge. Except, no employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theater which shows motion pictures, shall be subject to prosecution under this section if the employee is not an officer thereof and has no financial interest therein other than receiving salary and wages. (1969, ch. 223.)

§ 20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shal be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, § 20; 1939, § 20; 1924, § 20; 1922, ch. 390, § 20.)

§ 21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by § 7 hereof or any similar certificate, statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral, or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be

both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, § 21; 1939, § 21; 1924, § 21; 1922, ch. 390, § 20A.)

§ 22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, § 22; 1939, § 22; 1924, §22; 1922, ch. 390, § 21.)

§ 23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application,

which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, § 23; 1939, § 23; 1924, § 23; §1922, ch. 390, § 22.)

§ 24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, § 24; 1939, § 24; 1934, § 24; 1922, ch. 30, § 23.)

§ 25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, § 25; 1939, § 25; 1924, § 25; 1922, ch. 477.)

§ 26. Same—Waiver.

No waiver of the provisions of § 25 shall be made so as to evade the provisions of said § 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, § 26; 1939, § 26; 1924, § 26; 1922, ch. 477.)

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 69-655-J

SERAFIM KARALEXIS ET AL., *Plaintiffs*,

v.

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, *Defendant*.

Before Aldrich, *Circuit Judge*,

Julian and Pettine, *District Judges*.

Opinion

November 28, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture theatre which has been engaged in showing a film, owned and leased by Grove Press, Inc.,[1] entitled "I Am Curious

[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

(Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c 272 § 28A[*] as a result of their exhibiting the film, but notice has been given 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question the issues, of course, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F. 2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so

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[*] "§ 28A. Importing, printing, distributing or possessing obscene things

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . ."

that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the structure of *Ginsburg* v. *United States*, 1966, 383, U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film . . . is its appeal to prurient interest in sex . . . . [The film] is patently offensive to the average person and an affront to community standards. . . . [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on

[3] Another court, viewing this same film, has differed. *United States* v. "*I Am Curious (Yellow)*," 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four, or even three, justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

the Fourth Amendment grounds,[5] stating that the obscenity question should not have been reached. The Court held that in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley go?* Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of anti-social conduct or will probably induce its recipients to such con-

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[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless, the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.

duct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or the the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful, as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children. . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswold v. Connecticut*, 1965, 381 U.S. 479. If a rich Stanley can

[7] Non constat that a film which went beyond ordinary obscenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski* v. *Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler* v. *Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court to be

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[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc.* v. *Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is "interested not so much in expression as in making money. . . ."

the one to decide the statute's basic conflict with the federal constitution.[11]

We do not understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.* 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit their film under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

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[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines, supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*, 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay.

BAILEY ALDRICH
U. S. Circuit Judge

RAYMOND J.
U. S. District Judge

Dissenting Opinion

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pending final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever . . . has in his possession . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . shall be punished . . ."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropoulos* v. *Commonwealth*, 1961, 342 Mass. 658.

the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars, or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.' ". Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and

held that "the mere private possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemination of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Massachusetts obscenity statute is unconstitutional on its face.

On the question of abstention, the pertinent cases are *Dombrowski v. Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler v. Koota*, 1967, 389 U.S. 241.[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly, held that abstention was not appropriate. Since the Massachusetts statute is not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

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[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that

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[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to intervene as a party plaintiff was denied by the Court on July 15, 1969.

state courts and prosecutors will observe constitution limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing to day is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

/s/ ANTHONY JULIAN
United States District Judge

[6] See, for example the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.

JAN 2 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*,

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MEMORANDUM FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE MARYLAND CIVIL LIBERTIES UNION AS AMICI CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 905

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*,

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MEMORANDUM FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE MARYLAND CIVIL LIBERTIES UNION AS AMICI CURIAE

JURISDICTION

This Memorandum is filed with the consent of the parties[1] pursuant to Rule 42(1) of the Rules of this Court.

PURPOSE OF THIS MEMORANDUM

Amici agree with Appellants on the two basic questions: (1) that this Court should exercise its jurisdiction to review

[1] Appellants limit their consent as follows: "So long as it does not result in any further extension for the filing of a responsive motion."

the decision of Court of Appeals of Maryland and (2) that that decision, which prohibits the exhibition of the motion picture "I Am Curious (Yellow)" in Maryland, is plainly erroneous. However, we suggest that plenary review should be granted to permit this Court to reconsider the constitutionality of the Maryland motion picture censorship statute and the standard which has been utilized to measure whether motion pictures and publications are "obscene", and therefore outside the First Amendment's protections, since the 1957 decision of *Roth v. United States*, 354 U.S. 476.

Accordingly, this Memorandum will be limited to those issues as to which we have something substantial to add to the Jurisdictional Statement (hereinafter "J.S.").

I. THE MARYLAND CENSORSHIP STATUTE IS UNCONSTITUTIONAL

Maryland is the only state in the Union which imposes prior censorship upon the exhibition of motion pictures to adults. We urge that any such prior restraint is in contravention of the First Amendment. *Stanley v. Georgia*, 394 U.S. 557 (1969), discussed, infra.

Most of the defects of the Maryland statute are adequately explored by Appellants (J.S. 16 through 20). A reading of that statute reveals that it suffers from the fatal defect of vagueness. See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683 (1968). The statute's operative language reads as follows:

> "[The Board of Censors] shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene,[2] or such as

[2] Section 6(b) of the statute (J.S. 92a) reads: "For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." This clearly is broader than the *Roth* standard.

tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." Art. 66A Md. Code Ann., Section 6(a) (J.S. 92a).

Section 6(c) of the statute, which was not relied upon by the Court below, but which defines part of the statute's operative language, declares that a film "would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior" (J.S. 93a). This language is so vague and sweeping that no judicial determination could bring it within the *Roth* test.[3] The Maryland statute is no more clear than those struck down by this Court in *Interstate Circuit*, supra, and *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 685 (1959): "would tend to corrupt morals or incite to crime . . ." The effect is to leave the motion picture maker and exhibitor "unable to determine what the [statute] means," *Interstate Circuit*, supra, 390 U.S. at 684.

The importance to the adult citizens of Maryland of a clear determination by this Court of whether their right to voluntarily view motion pictures is to be subjected to the restraining scrutiny of a Board of Censors, operating under a vague and overbroad statute, requires plenary review herein. cf. *Freedman v. Maryland*, 380 U.S. 51 (1965).

II. THE ROTH TEST OF OBSCENITY IS VAGUE AND UNWORKABLE

The *Roth* standard was refined by this Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 418 (1966), (hereinafter "Memoirs") as follows:

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[3]Cf. *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 182-3 (1969), holding that the definition of obscenity in Section 6(b), supra, fn. 2, is co-extensive with the current interpretation of *Roth* by this Court.

> "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.' 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Some twelve years of judicial experience in applying that standard leads to the plain conclusion that it suffers from the same "vagueness and overbreadth" that this Court declared unacceptable in the area of First Amendment rights in *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). The standard is so broad and imprecise that it gives would-be producers and exhibitors of motion pictures (and writers and publishers of books) little warning as to what may or may not render their works "obscene" and therefore outside the pale of constitutional protection.[4]

An examination of the opinions in the Maryland Court of Appeals in the instant case reveals the inherent deficiencies of the *Roth* standard. The majority of four judges, despite finding that the bulk of the film is devoted to social matters and that "sexual activity is of an episodic nature"

[4] This Court listed the evils of such imprecision in *Interstate Circuit*, supra, 390 U.S. at 684: "... one who wishes to convey his ideas through [the medium of film], which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than running that risk, he might choose nothing but the innocuous...."

(J.S. 4a), found that "the overriding theme is sex per se . . ." (J.S. 6a). The majority never articulates a reason for this finding except perhaps its statement that "we cannot ignore the visual impact of a motion picture as contrasted with the printed word." (J.S. 8a). On the basis of such analysis the majority concludes that "the dominant theme of the film, taken as a whole, appeals to prurient interest in sex . . ." (J.S. 9a). A reviewing court could not refute this determination, it could merely overrule it.[5] It is clear that there is no objective standard which a court can apply to this part of the *Roth* test except the overall impression of individual judges. In making such a determination, innumerable variables will influence the court which have no place in the formulation of vital First Amendment rights. These include the libidinous proclivities of individual judges and their interest in the types of non-sexual matters which are presented in a given work.

Even more imprecise and unpredictable is the second portion of the *Roth* test, which the majority found to have been met by holding that the film "is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters." (J.S. 9a). Yet there is not one iota of discussion in the majority opinion of how it ascertained the tenor of "contemporary community standards." The majority did find that the "main objective" of the film was "to purvey shocking and titillating sexual sequences." (J.S. 4a). However, these sequences were not enough, both qualitatively and quantitatively, to shock and titillate the three dissenters, who found the film to be "a crashing bore." (J.S. 36a).

Finally, the majority found that "I Am Curious (Yellow)" is "utterly without redeeming social value" (J.S. 9a). The

[5] *Amici* suggest that this is the reason for the extraordinary number of summary reversals by this Court of findings of obscenity; see J.S. 11-12.

subjectiveness, and therefore unpredictability, of this finding is revealed by the majority's statement of its reasoning:

> ". . . the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived. We do not think that Lena's [the heroine] concern with social and political problems, so artificially depicted, supplies the redeeming social quality required to sustain the film." (J.S. 9a).

Thus, the Maryland Court of Appeals applying the *Roth* standard acted as a motion picture critic in assessing the artistic coherence and effectiveness of a motion picture. Such a determination is plainly outside of the competence of a court.[6] In addition, it is inconsistent with this Court's reasoning in *Kingsley International Corp. v. Regents*, 360 U.S. 684, 688-689 (1959), that "the Constitution[al] . . . guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And, in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Yet here the majority found the attempted social commentary unconvincing and, therefore, that the film lacked any redeeming value. The *Roth* test pushed the Court into making an artistic determination which *Kingsley* prohibits.

Even with a clear obscenity standard, if it is indeed possible to formulate one, there would be some risk of multiple litigation and conflicting decisions. But the vagaries of the *Roth* standard make it almost inevitable that a person desiring to distribute a motion picture which explicitly deals with human sexual relations must be financially able to defend himself in many forums. Thus, Appellant, Grove Press, Inc., the sole United States distributor of "I Am Curious (Yellow)", is presently participating in 23 dif-

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[6] See statement of Justice Douglas concurring in *Memoirs*, supra: "We are Judges, not literary experts or historians or philosophers." 383 U.S. at 427.

ferent law suits in 13 states contesting whether the picture can be publicly exhibited.

Roth and its progeny have made this Court the ultimate arbiter of obscenity in each and every case in which that question arises over the publication of a writing or the exhibition of a motion picture.[7] And until this Court has ruled on the obscenity of a given publication or picture, multiple litigation will continue and the attendant economic burdens will chill basic civil rights. This is inconsistent with both the orderly workings of this Court and the constitutional guarantees of the First Amendment.

III. ADULTS HAVE THE RIGHT TO READ AND VIEW ANYTHING THEY DESIRE

This Court in *Stanley v. Georgia*, 394 U.S. 557 (1969) held that the First Amendment protects an individual's right to view a concededly obscene film within the confines of his own home. The reasoning in that case overturned *a fortiari* the basic supposition of *Roth* that "obscenity is not within the area of constitutionally protected speech or press", 354 U.S. at 485. It did so by finding that the First Amendment protected Mr. Stanley's "right to receive information and ideas, *regardless of their social worth* . . .", 394 U.S. at 564 (emphasis added).

In addition, *Stanley* raises the question of whether the exhibition of motion pictures to willing adults in closed theaters is sufficiently "public" to justify state proscription on grounds of obscenity. The dangers of public distribution, which justify governmental interference, are cited in *Stanley* to be "that obscene material might fall into the

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[7] Cf. Justice Douglas dissenting in *Ginsberg v. New York*, 390 U.S. 629, 656 (1968): "Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old."

hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public", 394 U.S. at 567. *Amici* suggest that neither of these dangers can justify restraining the exhibition of a motion picture under circumstances, such as in the instant case (see J.S. 22), where children are barred from viewing the film and adults who pay the price of admission surely cannot have their sensibilities intruded upon.

We urge that this question is of fundamental importance and that this Court should have the advantage of briefs and arguments.

CONCLUSION

For the foregoing reasons this Court should note jurisdiction and direct the parties to prepare full briefs on the merits.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

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No. _____

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

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MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

The Appellee, in accordance with Rule 16(1) of the Rules of this Court, moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the appeal does not present a substantial federal question.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

This appeal is taken pursuant to 28 U.S.C. §1257 (2) which provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows: By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The statute which is alleged to be unconstitutional in these proceedings is the Maryland Motion Picture Censorship Act which is codified in Article 66A of the Maryland Code (the statute is set forth in its entirety in Appendix J of Appellant's Jurisdictional Statement).

B.

The Proceedings Below

The Maryland State Board of Censors refused to license the motion picture film, "I Am Curious (Yellow)" upon a finding that it was obscene, applying the standards set forth by this Court, as adopted by the Court of Appeals of Maryland. In accordance with Article 66A, §19, the Board promptly filed suit in order to have a judicial determination of this issue. The case came on for hearing within the time limitations set forth in the statute, with the Board having the burden of proof on the obscenity issue in accordance with the statute. The trial court viewed the film, heard testimony of numerous witnesses over a two-week period, and viewed the film again before reaching a decision. The Court filed an order, within the two-day period allotted by statute, disapproving the film for licensing upon a finding that the film "is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly

without redeeming social value. An appeal was promptly entered from this judgment and order.

In accordance with the statute the case was advanced for argument in the Court of Appeals of Maryland. The Court of Appeals in a four to three decision affirmed. The majority, in an opinion by Judge Finan, found that the movie was obscene under the tridentated test set forth by several justices of this Court in "*A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General*", 383 U.S. 413. This test, although only subscribed to by three justices of this Court, has generally been referred to as the holding of the Court in that case, and it is the test which the Maryland Courts have adopted. Judge Barnes concurred in the finding that all three tests had been satisfied, but he went further. He found evidence of pandering as envisaged by this Court in *Ginzburg v. United States*, 383 U.S. 463. He also found that the third test, i.e., that the material is "utterly without redeeming social value" is not to be applied to motion pictures but rather that the *Roth* standard, namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," without its judicial amendments, is the rule governing motion pictures. The opinion of the three dissenting judges is summed up: "Because I think the film is not 'utterly without redeeming social value,' I would (reluctantly and with regret) reverse the court below."

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. *The Maryland Statute is Constitutional*

Appellant has attacked the constitutionality of Maryland's censorship law in order to invoke this Court's appel-

late jurisdiction. They contend that the Maryland censorship statute is unconstitutional because it: (1) does not comply with the limitations prescribed by this Court for a licensing statute in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *Teitel Film Corporation v. Cusack*, 390 U.S. 139 (1968); (2) provides an unconstitutional standard for judging obscenity; (3) prevents the circulation of non-obscene films.

This is not the first time this Court has been asked to consider the Maryland statute. In *Freedman v. Maryland*, *supra*, (decided March 1, 1965) the Court found the statute to be unconstitutional as a violation of the First Amendment to the Constitution because:

> "1) If the Board disapproved the film, the exhibitor was required to assume the burden of instituting judicial proceedings and of persuading the court that the film was constitutionally protected expression; 2) after the Board had declined to license the film, its exhibition was prohibited pending judicial review, however long such judicial review might take; and, 3) the Maryland statute provided no assurance of prompt judicial determination."

By Chapter 598 of the Acts of 1965, enacted as an emergency measure, effective April 8, 1965, the General Assembly of Maryland repealed and reenacted Section 19 of Article 66A, with the obvious intention of fully meeting the three objections set forth in the *Freedman* opinion. The new Section 19 provides that any film duly submitted to the Board for examination and licensing "shall be reviewed and approved within five (5) days, unless the Board shall disapprove" the film under the provisions of Section 6. In the event of disapproval, the Board is required "within not later than three (3) days thereafter, to apply to the Circuit Court for Baltimore City for a judicial deter-

mination as to whether such film is obscene . . ." It is also required that "notice of such application shall be forthwith sent by first class mail, postage prepaid, to the address of the person presenting such film for licensing." The Circuit Court is required within five days after the filing of the application to conduct a hearing, view the film, and within two days after the hearing, "enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said Section 6 hereof." It is further provided that if the order disapproves the film, then the person presenting the film for licensing may appeal such determination to the Court of Appeals in accordance with the Maryland Rules of Procedure, and the Court of Appeals "shall advance such case upon its hearing calendar to the earliest practicable date" and in its review, the Court of Appeals "shall view the subject film." Then is added, "The burden of proving that the film should not be approved and licensed shall rest on the Board."

In *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A. 2d 235 (1965) the Court of Appeals of Maryland held that the amendment fully satisfied the constitutional requirements of *Freedman*.

Appellant's argument is that the amendment does not set a time limit within which the Court of Appeals must act and that the statute is therefore unconstitutional as not meeting the *Freedman* requirement of assuring a "prompt final" judicial decision. Appellant argues that the terminology "final judicial decision" means the decision of an appellate tribunal. This is clearly not the meaning of the Court in *Freedman*. Final judicial decision in this context means a final determination by a trial court on the merits, reviewing an administrative refusal to license.

The word "final" in this context is used to distinguish an adjudication on the merits after an adversary proceeding from a preliminary injunction. The Court made this clear in *Teitel Film Corp. v. Cusack, supra*, in holding that the Chicago censorship ordinance was violative of the *Freedman* standard because: The absence of any provision for a prompt judicial decision by the trial court violates the standard that ". . . the procedure must also assure a prompt final judicial decision." Statutory assurance of prompt judicial decision by the trial court in reviewing the action of the administrative censor is the requirement imposed by *Freedman* and applied in *Teitel Film*. Appellant here does not contest the statute at issue on these grounds, but rather he would create an additional requirement imposing time limitations on appellate action. Even though no such requirement has been enunciated by this Court, the Maryland statute goes a long way towards implementing such a procedure. It provides that censorship appeals shall be advanced on the calendar of the Court. In the instant case the appeal was advanced on the appellate calendar, and came on for hearing in the shortest possible time compatible with the preparation of the record and briefs. The lengthy opinions of the majority, concurrence, and dissent account for the complained of delay in the issuance of the Court's opinion.

A short review of the history of this case should be made to counter any allusions Appellant makes as to State caused delay. The Censors' determination, the filing of suit and the start of the trial were all within statutory time limits. The trial lasted two weeks — largely on account of lenthy cross examination by Appellant of Appellee's witnesses and because of the numerous witnesses produced by Appellant. The trial Court's opinion was filed within two days from the conclusion of the trial on July 31, 1968, in accord-

ance with the statute. The lengthy record was not completely transcribed until early in August. Briefs were then submitted prior to appellate argument on September 8th (the first day of the September Term of the Court of Appeals after the summer recess). The case was advanced on the calendar of the Court to be heard on that day. There was no request by Appellant for an immediate decision of the Court as had been rendered in some prior obscenity cases. The Court's lengthy decision was filed on October 22, 1969.

Appellant's second objection to the statute is that the definitional standard for obscenity set forth in Section 6 is so broad as to be unconstitutional. The short answer to this is that the Maryland Court of Appeals has already held in *Sanza v. Maryland Board of Censors*, 245 Md. 319, that the Section 6 definition of obscenity is unconstitutional. The statute does contain a severability clause and the Court in holding the definition of obscenity of Section 6 to be unconstitutional, held that the only standard of Section 6 which remains is that the Board shall disapprove such films "as are obscene". The Court recognized that the only proper standard for disapproval of a film was obscenity in a constitutional sense under the rules laid down by this Court. The only remaining standard of Section 6 after the Court of Appeals' decision in *Sanza* is the portion of Section 6 which states that the Board shall disapprove such films "as are obscene". This Court in *Roth* and *Alberts* upheld federal and state statutes stated in such broad definitional terms. The statute as it now stands recognizes only obscenity as defined by this Court as grounds for the refusal to issue a license; the Board of Censors applies only the Court's criteria in making its judgments; the proof at trial in review of their administrative determination is presented in accordance with these criteria; the trial court

applies these criteria, and the Court of Appeals of Maryland recognizes this Court's definition of obscenity as the only controlling criteria.

Appellant's third objection to the statute amounts to a general objection to prior censorship. This Court has precluded such an argument in *Times Film Corporation v. Chicago*, 365 U.S. 463, and *Freedman v. Maryland*, *supra*. Under the Maryland system of prior censorship only obscene pictures are refused a license, and this procedure is subject to the required judicial review. Films which are found to be non-obscene are granted a license with minimal delay.

It appears to be a fair conclusion that Appellant's attack on the constitutionality of the statute is only a device to meet the jurisdictional prerequisite of 28 U.S.C. §1257 (2) for review on appeal. His three contentions in this respect are patently specious when considered in the light of this Court's prior decisions. The first contention is precluded by *Freedman* and *Teitel Film*. The second contention is premised on an inaccurate factual basis, and the third contention has already been adjudicated against him in *Freedman* and *Times Film*.

B.

The Film is Constitutionally Obscene and Summary Reversal Pursuant to Redrup Would Be Improper.

Having reached this Court on appeal pursuant to a specious argument regarding statutory invalidity, Appellant now asks this Court to summarily reverse the judgment below on the obscenity issue. They state that the film is "plainly not obscene" and that therefore under the rationale set forth by this Court in *Redrup v. New York*, 386 U.S. 767 (1967), the Court should reach the obscenity issue and dispose of it in their favor.

Appellant's bland assertion that the film is plainly not obscene is easily refuted. The film was found to be obscene by a jury in the United States District Court for the Southern District of New York. It was found to be obscene in a very well reasoned opinion by Judge G. Joseph Tauro, Chief Justice of the Superior Court in Boston. It was found to be obscene by Judge Herbert W. Walton in a State Court proceeding in Johnson County, Kansas; by Judge John H. Lucas in a State Court proceeding in Kansas City, Missouri; and by Judge John J. Lally in a State Court proceeding in Spokane, Washington. It was found to be obscene by a three judge federal court in the United States District Court for the District of Kansas. It was found to be obscene by a Maryland trial court and the Court of Appeals of Maryland. The foregoing list is merely illustrative of the findings of obscenity as to this movie and it is not exhaustive.

These judicial findings of obscenity are supported by well reasoned opinions, and we incorporate these by reference into this Motion. We also restate the arguments set forth in the Appellee's Brief (pages 15-33) in the Maryland Court of Appeals, as to this issue.

It must be noted that each of the judicial findings of obscenity was made by applying the three tests enunciated by Justice Brennan in the *Memoirs* case. This is the most liberal of the varying tests for obscenity which some members of the Court have enunciated, and as will be further stated in the next argument, it is not at all clear that it is the proper test to be applied, particularly to motion pictures.

Redrup v. New York, supra, is not authority for summary reversal even if the Court were to view the film, review the testimony, and come to the conclusion that it was not ob-

scene in the constitutional sense. *Redrup* involved three separate appeals from convictions for sale of allegedly obscene materials, which were consolidated. The Court originally limited review in these cases to certain particularized questions upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense" in *Memoirs*. Finding that hypothesis, i.e., that the material was "obscene" within the meaning of Memoirs — invalid, this Court reversed without considering the other issues. The Court noted in a *Per Curiam* Opinion that the material was not obscene under *any* of the various theories of obscenity propounded by the different justices in *Memoirs*. The Court indicated that it was able to reach the obscenity issue and dispose of the case on that basis because there were no special circumstances which would warrant the application of any other criteria. The Court indicated that it would not have been able to dispose of the cases in such a summary manner if: (1) the statute in question reflected a specific and limited state concern for juveniles; (2) the case involved a suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; (3) there was evidence of pandering. If any of these elements are present additional issues other than obscenity *vel non* must be considered and summary reversal on the basis of *Redrup* is not appropriate.

The pandering exception is the one which would prohibit summary reversal in the case at issue. The Court in *Ginzburg v. United States*, 383 U.S. 463, held that proof of pandering vitiates any claim of socially redeeming value. Therefore when pandering is an issue, material which is otherwise not obscene can be branded obscene because the purveyor has chosen to market the material as being

salacious. In the case at issue, evidence of pandering was adduced at the trial court, but inasmuch as there was a finding of constitutional obscenity the Court did not have to reach the pandering question. Pandering was argued on appeal, (Appellee's Brief, pp. 33-35) but for the same reason the majority did not reach the issue. Judge Barnes concurring did reach the pandering issue and found Appellant's culpable on that grounds. This Court can not properly reverse summarily on the basis of *Redrup*, no matter what its findings are on the obscenity issue, with the pandering issue still to be resolved.

Redrup has not changed the test for obscenity as some courts and commentators have felt — *Roth* and *Memoirs* are still the controlling standard as reaffirmed by this Court in *Stanley v. Georgia*, 394 U.S. 557.

Redrup, while not providing grounds for summary reversal in this case, would justify the granting of this motion. The Court could, on the record before it, and upon a view of the film arrive at the conclusion that the film is constitutionally obscene. Such a decision would obviate any necessity to consider the pandering issue. *Redrup* has not been so used by this Court to affirm a lower Court's finding of obscenity, but the rationale is certainly applicable. If the material is clearly obscene, as here, and there are no substantial federal questions raised, as here, summary affirmance is in order.

C.

The "Socially Redeeming Value Test" Is Not A Proper Independent Test for Obscenity.

A majority of this Court agreed on a test for obscenity in *Roth v. United States*, 354 U.S. 476. This test was "whether to the average person, applying contemporary

community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court held that obscenity was not protected by the First Amendment because it is "utterly without redeeming social importance." Justice Brennan joined by Chief Justice Warren and Justice Fortas in *Memoirs, supra*, expanded the *Roth* test by adding a requirement that the material must be "utterly without socially redeeming value" before it can be considered obscene. This added test evolved from the language in *Roth*, but *Roth* does not warrant such an interpretation, as pointed out by Justice White and Justice Clark in their separate dissent. The dissenting Justices point out that "social value" is not an independent test and that it is erroneous to equate a modicum of social value with the *Roth* standard of social importance. Certainly any work with minimal social value does not have social importance.

Appellee submits that "social value", is not the correct standard but rather that "social importance" should be the measure. Appellee further submits that the issue whether there is "social importance" is not an independent test of obscenity but is relevant only in determining the predominant prurient interest of the material. The minority opinion of Justice Brennan in *Memoirs* has somehow been generally accepted as setting forth the controlling rule of obscenity both as to books and movies. This is the wrong test to judge the obscenity of any material.

D.

Different Standards of Obscenity Should Be Applied to Motion Pictures.

Even if we are to accept the misconstruction of *Memoirs* with its independent "utterly without socially redeeming value" test, it does not follow that this test should be

applied to motion pictures. The test was enunciated in a case involving books, and if it is at all applicable, it is only applicable to books. Therefore if the Court were to apply the three pronged test of *Memoirs* and arrive at the conclusion that the film is not constitutionally obscene under these standards, it should take into consideration whether these standards, specifically "the utterly without socially redeeming value test," are properly applicable to motion pictures.

This Court and numerous other courts have noted a difference between movies and novels in the obscenity context.

As early as 1952 when this Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("the Miracle") in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, JJ., concurring; there were no dissents) observed the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present it own peculiar problems." (343 U.S. at 502-503, 72 S. Ct. at 781, 96 L. Ed. at 1106).

Mr. Justice Clark in his concurring opinion in *Kingsley Pictures Corp. v. Regents* ("Lady Chatterley's Lover"), 360 U.S. 684 (1959) stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness.'" (Emphasis in original).

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman v. Maryland, supra:*

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Judge Hays, in the Second Circuit case involving the film in this case in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books." (404 F. 2d at 198).

In the State Courts the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966) the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland, supra*). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal. L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-

darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J. supra, at p. 708).

"Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." Id. at 181.

The obscenity finding in this case was affirmed by the Supreme Court in 388 U.S. 450.

See also the interesting discussion of this matter by the Court of Appeals of New York in *Trans-Lux Dist. Corp. v. Board of Regents*, 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964), rev'd per curiam, 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) citing only *Freedman v. Maryland*, *supra*, from which it can be inferred that the reversal by the Supreme Court was on the basis of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity.

It is also most interesting to note the position the present Appellant, Grove Press, took in the *Memoirs* case. That position as set forth in their brief was that the "social value" tests should be limited to books. This argument was explained in a recent book by Charles Rembar, counsel who represented Grove Press in *Memoirs*. The book entitled "The End of Obscenity," was published in 1968 by Random House. Mr. Rembar, on pp. 436 through 441 presents a strong argument for limiting the "social value" test to books — an argument which conceivably induced certain members of this Court to adopt the test. This argument of counsel for Grove Press is of real interest in this case involving a movie, and should be brought to the Court's

attention in its entirety. Quoting from pages 436 to 441 of the book:

"The final problem in writing the brief (save one that I will discuss in a later chapter because my decision was not to deal with it in the brief at all) was not raised either by the court below or by our opponents. It had to do with whether the value test could operate in all situations and for all forms of expression. Up to this point I had never spoken of possible exceptions, nor did the language of *Roth* on which we relied suggest any. Though the problem had been on my mind, it was not something that I had thought it necessary, or desirable, to discuss. But now, I felt, it had to be dealt with, to some extent at least: the Supreme Court might be undertaking a fundamental review of the law, and nine agile intellects would be ranging over the field of obscenity.

The value test had a valid conceptual basis in the First Amendment and a valid precedential basis in *Roth*, and it worked well — made practical sense — in the cases where we had sought to apply it. Yet one could conceive of situations where, though the test by its terms might seem to invoke the guaranty, the Court would certainly approve suppression. Let us assume a play in which an act of sex is performed (performed, not suggested). Let us also assume the play has dramatic merit. To make the point plain, let us finally assume it is broadcast on network television. (The reader may make his own choice of the particular variety of sexual act, and of whether the broadcast would be in black-and-white or living color.)

I did not want to undertake a specific discussion of hypotheticals such as this. My opponents in the various cases had not brought them up. They did not argue that the value theory should be rejected because in some areas it was unworkable. Rather, they urged that *Memoirs* itself failed the value test (as the attorney general contended), or that there was no such thing as a value test (as the Citizens for Decent Lit-

erature were to contend). It would hardly be wise to spell out an argument against our position that our opponents were not making. Nevertheless, either during the hearing or in the Justices' private thinking, horror examples might come into their deliberations. I wanted to suggest a solution without posing the problem.

There were two things in the brief that I hoped would serve the purpose. One was the distinction between expression and conduct. The imaginary television show I described involves performance and public audiences. It may be true that the performers have something to communicate, and that to this extent expression would be silenced, but the situation may fairly be regarded as in its essence action. The Court had sanctioned the impairment of communication where elements of action were present; it had, for example, approved restrictions on parades, and on the use of 'loud and raucous' sound trucks, and on salesmen calling without invitation. A defendant charged with indecent exposure — in the streets, not on the stage — might also argue that his effort is to communicate, and no doubt it is.

Having drawn on the distinction between expression and conduct, I then suggested that another kind of distinction might be appropriate — among different forms of expression. Again, I did not offer it as a reply to something said on the other side, but rather as an affirmative part of our own argument, an additional reason for giving new freedom to writers. The final paragraphs of the brief were these:

> 'It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-

obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theater audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems. (The familiar hypothetical from another area of restraint — shouting "Fire!" in a theater — would hardly present a problem if there were only one other person in the theater.) Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication — the sound truck, for example, or the advertising poster in a train or bus — make us their captive. Television, the great new medium of our time, presents both aspects: its communications are usually received in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John

Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value — "literary or scientific or artistic." The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that in a case where value is proven, a book may not be destroyed. That is the case before the Court.'

If the television example and other *casus horribiles* should occur to Justices, these paragraphs would serve as a reminder that they involve modes of communication other than books. If one of the insupportable

hypotheticals should someday become real, the Court could distinguish its *Fanny Hill* decision (assuming it was a decision in our favor) on the ground that the uncompromising social-value test had gained acceptance in a case that involved a book.

There was no precedent for separating media of expression but neither was there precedent that stood in the way. The Court had declared motion pictures protected by the First Amendment, but whatever statements had been made by individual Justices, the Court had not ruled — there had been no case presenting the question — that motion pictures are entitled to protection in the same way or to the same extent as books. Nor does it follow. It would not follow even from Black's absolute view of the First Amendment. Black's premise is that the Amendment is to be taken literally. The Amendment states, the reader will recall, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .' Black's appealing argument is that 'no law abridging' means 'no law abridging.' The majority's answer to Black, that the First Amendment had never been construed to confer an unlimited freedom, had behind it massive authority and little logic; it represented a conclusion, not a reason.

But there is another answer where the books are not involved, one that Black might accept. If the Amendment is to be given a literal reading, then it may be said that films, and other art forms that are not entirely verbal, are not literally speech or the press. On the other hand, once 'speech' and 'the press' are expanded beyond their plain meanings, we are not reading the amendment literally; if that is the way the game of interpretation is to be played, then a converse liberty may justly be taken with the word 'abridging.' The Amendment's prohibition against lawmaking need not be imposed strictly where what the law affects is not strictly speech or the press.

The extreme situations could thus be accounted for, whether the First Amendment is to be given a literal construction or the traditional loose construction. Two

members of the Court subscribed to the literal construction, and of the others, there were three or four who I hoped would accept the value test; the two groups taken together would make a majority. It was that majority for whom, if they should be troubled by cases not present but envisioned, it was necessary to provide solutions.

I was of course not interested in suggesting candidates for censorship. But I was speaking to a Court which, as I saw it, had not the slightest idea of granting complete freedom for everything that might be called expression. I was saying that situations for which it might think anti-obscenity laws altogether fitting were different from ours; the precedent the Justices would set by ruling in our favor, need not in future cases haunt them. Remote regions of constitutional law did not have to be mapped in detail. It was enough to point out that distinctions among modes of communication were permissible, that the Court's opinion need not state a single rule for all of them, and that the printed word was entitled to the greatest freedom. What the attorney general had proceeded against was the printed word."

The difference between films and books having been recognized by the Court, and by Appellant, Grove Press, in a prior case before this Court, what sense does it make merely to pay lip service to it? If this Court says movies are different and different standards should apply to them, then different standards should be formulated and applied. The only contray indication to this reasoning is *Jacobellis v. Ohio*, 378 U.S. 184, where this Court applied standards governing books to a movie, but Appellee submits that the display of sex in that movie was so innocuous by present day standards that it would have been found not to be obscene under any standard and that the application of the criteria governing books to a movie in that case does not determine the issue

If not the threefold test of *Memoirs*, what test should be adopted to effectuate this Court's recognition of a difference between books and movies? Two viable alternatives have been mentioned. One suggestion is that the *Roth* test without the "social value" criteria added by later cases should be the standard. This alternative is recognized by Grove Press counsel in the quoted material as having merit, it has been expressly held to be the law by the Kentucky appellate court in *Cain v. Kentucky*, 437 S.W. 2d 769; Judge Tauro in the Boston case involving this movie heretofore referred to, so held; and Judge Barnes in his concurrence in the case at issue made such a finding. The other alternative of equating obscene films with proscribed conduct rather than protected speech is also recognized by Grove as having merit in the incorporated quote. This test was well stated by the Court of Appeals of New York in *Trans-Lux Dist. Corp. v. Board of Regents, supra.*

Appellee submits that if there is anything worthy of review in this case, in a plenary manner, as opposed to summary affirmance, it is the reevaluation of a definition, to be concurred in by at least a majority of this Court, first as to books and second as to films. This Court has not adopted by a majority of its members the three pronged test of obscenity enunciated by Justice Brennan in *Memoirs* as to books let alone as to films. The lower Courts are left in a quandry as to the controlling test, and in this judicially created vacuum they have opted to the ultra liberal "social value test," probably because this formulation was printed first in the formal rendering of the Court's opinion. If the holding in *Roth* that obscenity is to be excluded from constitutional protection is to be given practical effect, the independent "social value" test must be discarded.

Certainly even if this Court were to adopt the three pronged test as to books, the test as to films would be more liberal.

E.

Appellants' Other Contentions Are Insubstantial.

Appellant contends that the fact that the Maryland Court's finding as to obscenity is in conflict with the finding of the Second Circuit raises a substantial federal question. Rule 19 of the Supreme Court Rules setting forth consideration governing review on certiorari provides that where there is a conflict between the decisions of two Circuit Courts of Appeal this will be given consideration in deciding whether to grant the writ. There is no indication in the applicable statutes on rules that the mere fact that a State Court decision conflicts with a Federal Circuit Court decision raises a substantial federal question. Appellants cite no authority for their proposition that such a conflict does raise a substantial federal question. Absent such authority, their proposition must fall.

Appellant also attacks the constitutionality of multiple State and local obscenity proceedings against material which has survived a contested customs case in the lower federal courts. No substantial federal question is presented by such a contention. For Appellant to prevail he would have to forge a new Constitutional provision into our federal system to the effect that the States are bound by the decisions of lower federal courts. The multiplicity of State actions is inherent in our federal system — only the Supreme Court can bind the States by a judicial interpretation of non-obscenity. This Court, in *Freedman v. Maryland, supra*, definitively held that a State may validly exercise a censorship system subject to procedural safeguards. Appellant's argument in this respect is directly contrary to settled Constitutional law.

Appellant also attempts to convince the Court that the application of the Court's finding in *Stanley v. Georgia, supra*, to the facts at issue raises a substantial federal question. The Court's holding in *Stanley* clearly does not apply here. The Court's holding was, "We hold that the First and Fourteenth Amendments probihit making mere private possession of obscene materials a crime. *Roth* and the cases following that decision are not impaired by today's holding." The Court also noted that "*Roth* and the cases following it discerned such an 'important interest' in the regulation of commerical distribution of obscene materials." "I Am Curious (Yellow)" is surely commercially distributed if it has been shown in "50 cities, 25 states and the District of Columbia," and just as surely *Stanley v. Georgia* is inapplicable.

Appellant raises several more obtuse questions under the hearing "suppression of favorable leads." Appellee adopts the findings of the Maryland Court of Appeals as to these contentions. These findings establish the insubstantiality of the contentions.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Maryland.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

Office-Supreme Court, U.S.
FILED
JAN 19 1970
JOHN F. DAVIS, CLERK

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

APPELLANTS' REPLY MEMORANDUM

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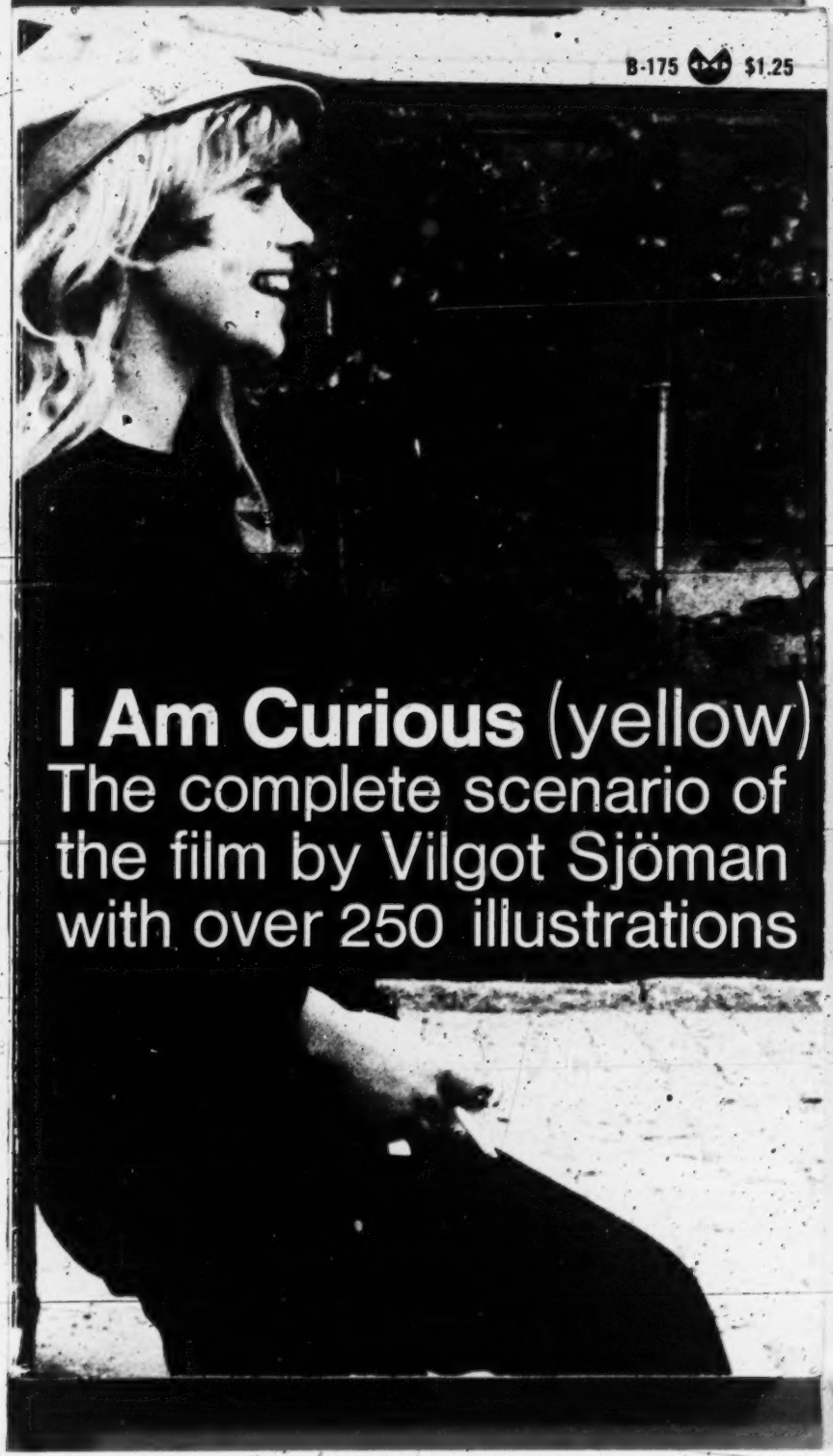
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I Am Curious (yellow)
The complete scenario of
the film by Vilgot Sjöman
with over 250 illustrations

I Am Curious (Yellow)

"*I Am Curious* accuses, with amazing poisonousness, monarchy, Social Democracy, neutrality, and the Swedish standard of living; that is, the main supports of Scandinavia's good conscience . . . *I Am Curious* is not just a film made by a moralist, it is also a film by a great cinéast." —Pierre Billard, *L'Express* (Paris)

"His ferocity is despair: Sjöman pulls down all the barriers he discovers, including the outermost sex barrier. But the prison remains: the stronghold of Puritanism, nationalism, egocentricity."
—Lasse Bergström, *Expressen* (Stockholm)

"A naked, desperate revolt against well-fed, self-congratulatory, hypocritical, blue-and-yellow-flag-waving Sweden . . ." —Finn Carling, *Dagbladet* (Oslo)

"Films for all times exist in large numbers, lying about moldering in the film archives and in our memories. Sjöman's film is an active political act right here and now in the Swedish arena, a thrust toward the heart of our lukewarmness and our neutrality."

—Mauritz Edström, *Dagens Nyheter* (Stockholm)

"...*I Am Curious* marks an important date. With its release, all the 'allusive' films of the past seventy years, all those scenes of seduction which fade out chastely, have with one blow aged by twenty years. In several years, with the exception of the *chef d'oeuvres*, the majority among them will seem hypocritical and ridiculous. They will be appreciated for their 'camp' side, like comics and cloche hats."

—Michel Mardore, *Nouvel Observateur* (Paris)

I Am Curious (Yellow)

A film by Vilgot Sjöman

Translated from the Swedish
by Martin Minow and Jenny Bohman

Grove Press, Inc., New York

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Excerpts from the transcript of the trial

1. The elevator

Someone is overheard composing a jingle, "At Sandrews they make good films . . ." A well-dressed elderly woman enters the building at Kungsgatan 65, Stockholm. Unfortunately, the elevator is already occupied by a burly middle-aged man and a pint-sized young woman who's pulling at his tie ingratiatingly. They are **LENA NYMAN, DRAMA STUDENT, AGE 22,** *and* **VILGOT SJÖMAN, YOUNG DIRECTOR, AGE 42,** *who have just been visiting Sandrews, the film company. The elderly woman is disgusted.*

Over a close-up of Lena, the title:

I AM CURIOUS

Over a close-up of Vilgot:

I AM CURIOUS

LADY (*answering the titles*): But *I'm* not. You stick to your films!

Visibly annoyed, she turns her back and walks up the stairs to Saga, a sports organization located in the same building.

For a moment Lena is distressed.

LENA: Oh. I thought it was my old lady.

VILGOT: Your old lady?! Oooh!

2. Slogans

Dusk: A trade-union hall. Above the building flies the Swedish flag, a yellow cross on a blue background.

MALE VOICE: Buy our film. Buy it! Buy it! The only film that's shown in two editions: One yellow and one blue!
FEMALE VOICE: Buy the yellow! Buy the blue!
Buy our film because it's two!
MALE VOICE: Exactly the same picture, yet so different.
FEMALE VOICE: Big things and little things!
MALE VOICE: The blue picture!
FEMALE VOICE: Beautiful things and ugly things!
VOICES: The yellow picture! This is the yellow edition! Yes, the yellow edition! The yellow edition! Presenting the yellow edition! This is the yellow edition!

3. Yevtushenko reads poetry

A meeting hall inside the building. Yevgeny **YEVTUSHENKO, RUSSIAN POET, AGE 33,** *stands before a microphone at Clarté, a radical political organization. But the sound system doesn't work. There are catcalls.*

VOICES: Louder! Louder! Check the one to the right. No, no, the left. Further left. The left! (*Chanting:*) To the left, the left, the left. Further to the left.

Laughter. Lena and Vilgot are in the audience. Lena hums an old sailor's song.

LENA: "In Rio de Janeiro you can fuck for free . . ."
VILGOT (*embarrassed*): Quiet.
LENA: Look over there. Do you see that guy?
VILGOT: Yes.

LENA: Magnus. He's an actor at the University theater. He would be fine as the slave.

VILGOT: Him?

LENA: Mmm. And I could have a little love scene with him.

VILGOT: Oh, I see.

LENA: Hmm.

VILGOT: And what would that love scene be like?

LENA: Oh, just a quickie, you know.

VILGOT: Well . . .

Confusion on the stage. The microphone still doesn't work. No one can find out what's wrong. Yevtushenko loses his patience and speaks in a loud voice directly to the audience.

YEVTUSHENKO: Dear friends! I have heard that quite a few members of Clarté are revolutionary. But if they're

going to organize the revolution the way they've organized tonight's meeting—how will that end?

Laughter and applause. The reading soon begins.

VILCOT (*voice over*): It's a damn shame that Lena doesn't understand politics. But God, drama students!

Yevtushenko begins reading.

YEVTUSHENKO: "There are no memorials over Babi Yar.
Only an abrupt bank like a crude
epitaph rears . . ."

VILGOT (*voice over*): Well, one day I'll tell Lena about the fate of socialism in Sweden. No! I'll have to tell her about the two heads of Swedish socialism: the big self-satisfied head and the little shrunken one.

Photos of workingmen in the thirties; then shots of a mongoloid child beating his head against the metal bars of a crib.

4. Lena sleeps over

The same evening, after the reading, at Vilgot's apartment. Lena washes her face and crawls into bed with the outline for a film, LENA ON THE ROAD: A KALEIDOSCOPE. *Vilgot looks at photographs of ancient erotic Indian temple sculptures while he trims his hair with electric clippers and hums a song he is composing.*

VILGOT (*sings*): "I like my own sweet name.
I like the touch of fame.
I like my own sweet name.
I like the touch of fame."

VILGOT (*voice over*): Sneak Lena into my bed. She doesn't even dare to tell her mother that she's spending the night with me. Oh, no, her mother is supposed to believe that Lena is staying with some girl friend from drama school.

Vilgot goes into the room. Lena pretends to be asleep. In Lena on the Road, *Lena will often wear different kinds of glasses, both old and new. Vilgot begins to try them on her. Sometimes she looks like a little child; sometimes like an old grandmother.*

It is dangerous to be in love with your star. So Ingmar Bergman used to tell me. "You become blind

to her affectations," he said. It never happened to him, though.

I met Lena when we shot *491*, but nothing much happened then. We were a bit turned on to each other, that's all. . . . There've been some changes made.

Lena wakens from her make-believe sleep and grabs Vilgot by the beard, pulls him down to her.

VILGOT: Ouch!

5. *Lena asks questions*

Vilgot sends Lena into the streets of Stockholm to collect interview material for the new film. She is assisted by Ulla Lyttkens, another drama student, and Magnus, who is to play the slave.

Lena walks into a restaurant kitchen, carrying a tape recorder and microphone.

LENA: Do you think that Swedish society has a class system?

WOMAN IN RESTAURANT KITCHEN: Class system, how do you mean?

Ulla in an auto repair shop.

FOREMAN: Strictly speaking, I don't think it has. We have . . . I mean, everybody is kind of sticking together.

In a restaurant near the dock.

FIRST DOCK WORKER: I don't know. I can't answer that. Ask somebody else.

SECOND DOCK WORKER: I don't think it has.

LENA: You don't?

SECOND DOCK WORKER: No.

In a post office.

OLD MESSENGER: No politics for me, thanks!

Outside a shop. Lena is kneeling in the doorway.

LENA: Do you think that Swedish society has a class system?

THREE-YEAR-OLD BOY: Yes.

LENA: You do?

THREE-YEAR-OLD BOY: Yes.

Lena with two students, recently engaged.

LENA: An architect or a doctor earns ten to fifteen times more than a dishwasher. Do you think that's fair?

FEMALE STUDENT: Yes, I think that's fair.

MALE STUDENT: Sure, that's fair.

FEMALE STUDENT: When you consider that an education takes at least seven years and how much you have to deny yourself during that time . . .

Magnus is taking still photographs of some of the subjects.

In a restaurant.

LENA (*voice over*): But ten to fifteen times more! I think that's too much. Much too much!

YOUNG WORKER (*complacently*): Well . . . I don't think it's that bad.

In the street.

SALVATION ARMY OFFICER: It's fair to the extent that those who aren't clever enough can hardly go on with their studies. Studying is a thorny path and few people have the energy to do it. I have to go now.

In a repair shop.

ULLA: Do you think that women have the same opportunities as men in our society?

MAN WITH "VOLVO" CAP: Yes, I suppose they have.

ANOTHER MECHANIC: Yes, sure they have, if not more. (*Smiling.*) Don't you think that the women are running things now?

In a hospital corridor, Lena approaches two young nurses' aides.

LENA: Do you think that there is a hierarchy in this hospital?

FIRST NURSES' AID (*shyly*): No.

LENA: So you don't think there is a difference between doctors and nurses' aids?

SECOND NURSES' AID: Of course, the time you eat is different.

LENA: The time you eat?

SECOND NURSES' AID: Yes, the time you eat.

In the subway.

ULLA: Do you think that Swedish society has a class system?

YOUNG MAN: What?

ULLA: Do you think that Swedish society has a class system?

YOUNG MAN: No.

ULLA: Can you explain yourself?

YOUNG MAN: I don't get what you're saying.

He hurries off. Ulla approaches a man walking, reading a newspaper.

ULLA: Excuse my interrupting your reading. Do you think Sweden has a class system?

MAN WITH NEWSPAPER: I am not Swedish.

ULLA: Don't you understand Swedish?

MAN WITH NEWSPAPER: I understand it. But I'm not Swedish.

LADY IN HAT: I don't understand. I am German.

UNSHAVEN MAN: I–I–am–not–Swedish.

ULLA: Do you think that Sweden has a class system?

MAN IN HAT: Yes.

MAN IN GLASSES: A what?

ULLA: A class system.

MAN IN GLASSES: Yes, in a way.

In a department store.

LADY IN FEATHER HAT: Yes, I think it has.

LADY IN GLASSES: No, I don't think so.

ULLA: So you think that Sweden has gone as far as it can in removing class barriers?

LADY IN GLASSES: Yes, it just might go a little bit farther, but . . .

BEARDED YOUNG MAN: I don't think you can go much farther as far as that's concerned. There has to be a difference in wages according to efficiency, so to speak, if society is to function.

In an elegant shoe store.

BOOTBLACK: Oh, this kind of interview I don't like . . .

In the subway.

MAN IN HAT AND COAT: In the thirties there was a difference between the classes. At that time we had the white-collar workers. The gap between the classes is just as wide today, if not wider.

In a restaurant kitchen.

CHEF: It depends on the people themselves, doesn't it? Undress them all! When they are naked they're all alike. Dress them again and you have the class system.

6. *Lena at the Forbundshuset*

LENA (*voice over*): In order to try to understand all this better I decided to go to the headquarters of the labor movement at Branting's Square.

Lena goes into the offices of the Carpenters' Union. In the corridor, she meets an ombudsman on his way to Parliament.

OMBUDSMAN: There couldn't be a class system. Don't we live in a democracy? In a democratic society?

Lena goes down to the cafeteria. Since people who don't work for trade unions also eat here, she has to ask her way along the cafeteria line.

LENA: Do you belong to the labor movement?
MAN: What now?
LENA: Are you with the labor movement?
MAN: No.
LENA: Is anybody?
MAN: No, not here.
LENA: Labor movement?
VOICE: No.
LENA: Are you with the labor movement?
ANOTHER VOICE: NO!

Lena finds two ombudsmen seated at a table.

LENA: Why is the labor movement so damned conservative when it comes to women's rights?
FIRST OMBUDSMAN: So you find the labor movement conservative on the subject of women's rights!

In the offices of The Metalworker.

EDITOR-IN-CHIEF: I guess that's partially true. But it could

* A building housing Sweden's major trade-union organizations.

possibly be partly due to the fact that we have a lot of conservatives in this country. And there's bound to be quite a few of them even in the labor movement.

In the cafeteria, with the ombudsmen.

LENA: But why is it that women have fewer chances of getting good jobs?

SECOND OMBUDSMAN: You're the one who's claiming that.

LENA: Sure, I'm the one who's claiming that. Do *you* claim that it isn't so?

SECOND OMBUDSMAN: No, I don't have to make any claims. You have to prove that you are right.

FIRST OMBUDSMAN: Yes, let's have some proof! You shouldn't go around making claims when you don't know the facts.

LENA: My mother works as a furrier. She works every day of the year. She makes about 14,000 kroner.*

SECOND OMBUDSMAN: But if I became a furrier, what would I get?

LENA: But you won't become a furrier.

SECOND OMBUDSMAN: You never know.

Lena finds an architect in the cafeteria.

LENA: Do you think that Swedish society has a class system?

ARCHITECT: Well, I think it has—to a certain extent.

LENA: What are you going to do about it?

ARCHITECT (*smiling*): I'm going to climb up the ladder. You've got to live in the society you were born into.

LENA: Do you work for the labor movement?

ARCHITECT: No, I don't.

LENA: What do you do then?

ARCHITECT: I'm an architect.

* One dollar equals approximately 5.18 kroner.—*Trans.*

Lena, with the two ombudsmen again.

FIRST OMBUDSMAN: Oh, yes, there is a class system, of course there is.

LENA: What are you going to do about it?

SECOND OMBUDSMAN: We aren't going to do anything about it, at least not for the moment.

LENA: Why not?

SECOND OMBUDSMAN: Since we all live in a society with class barriers, I'm a part of it. And then, you know, there are democratic rules, and the individual doesn't have a direct influence on development.

In an office.

SECRETARY: I'm sure the individual can't do very much.
LENA (*voice over*): Nothing? Can't he do anything?
SECRETARY: No, I don't think so.

In a corridor.

LADY WITH UPSWEPT HAIR: I'm not an active union member.

In the cafeteria.

MAN'S VOICE: But we're going to negotiate.
LENA: Negotiate?

MAN'S VOICE: Yes.
LENA: What will happen then?
MAN'S VOICE: You don't know?
LENA: No, I don't.
MAN'S VOICE: Don't you keep up with things like that?
LENA: No.
MAN'S VOICE: And yet you run around asking questions.
LENA: So I've got to ask you people who do know.

MAN'S VOICE: Then read the newspapers. You can learn a lot from them.

LENA: You can't tell me? What happens at those negotiations? Are there any results? How long will it take before the class barriers can be removed? Equal wages and no class system!

A MAN: A very long time, probably.

LENA: Why?

THE MAN: Because people are conservative. They don't want any radical changes.

LENA: Like what, for example?

ANOTHER MAN: Extended government programs, for example . . . Increased participation in management decisions, that's another thing . . .

LENA: Anything else?

THE OTHER MAN (*to a friend across from him*): Well, what else are we going to do?

In the offices of The Metalworker.

LENA: You really think that you are doing something to get rid of the class system?

EDITOR: As much as I can.

LENA: Can't you do anything more?

EDITOR: It all has to do with what position you have in society.

LENA: Do you have to be at the very top in order to do anything at all?

EDITOR: No, no, no! This is a matter of applying pressure from underneath that will have an effect all the way up.

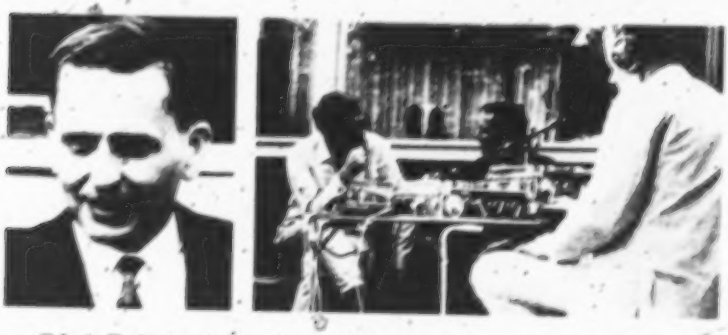
LENA: But the real big-shots who have influence and power to do a lot—do they use it?

7. At the home of Olof Palme

The question leads directly to **OLOF PALME, AGE 39,** *then* **MINISTER OF TRANSPORT** *in the Social-Democratic government. In foreign affairs he is known for his sharp criticism of the American role in the Vietnam war. On domestic issues, he has been called "a fanatic about equality."*

OLOF PALME: In many ways we still have some of the characteristics of the old class system. We have, as I think someone has said, a class system by income, and you can see exactly why.

Rural workers have lower wages than urban workers. Women earn less than men, and older people less than the young. Education perpetuates the class system. University graduates get six to seven times more than those who leave school and go straight to work in the country.



Olof Palme lives in a little row house outside Stockholm. The film crew is working in the backyard. Magnus happens to be present. He is sitting beside Lena, which irritates Vilgot. The filming is also interrupted by **MÅRTEN (MOUSIE), AGE 5,** *who is banging against the wall from inside the house.*

VILGOT (*breaking off*): Come outside, Mousie! You see, if

you make that noise, it'll ruin the sound track.

The shooting has stopped. The boy crawls up onto Palme's knee. The cameramen load the camera. Vilgot asks Palme how he became a Social Democrat.

OLOF PALME: Well, this problem of class system in Swedish society—I feel very strongly about it. That's what I've reacted against from the beginning . . .

VILGOT: What is your own background?

OLOF PALME: I come from a middle-class family. You learn a lot through books, you observe a lot, and suddenly it starts forming a pattern. This happened to me sometime between the ages of fifteen and twenty—around the time when I saw American society.

VILGOT: You traveled in the States? About what year was that?

OLOF PALME: '47 to '48. I hitchhiked.

VILGOT: I see.

OLOF PALME: Thirty-four states. Three months without money.

VILGOT: I see.

OLOF PALME: You see, it's mixed up with the books you read. You read fiction: I think that some fiction has enormous political importance. For me, in any case.

VILGOT: I see.

OLOF PALME: This—in connection with political theory and visual impressions—that's quite a rough combination.

The filming drags on. Palme's wife, Lisbeth, looks out from an upstairs window and wonders how much more time the crew will need. Mousie jumps around on his father's knee and waves to his mother.

LISBETH PALME: Mousie was going to ask you a few questions too. But he seems to have forgotten them.

VILGOT: I see. Do you have any questions, Mousie?

LISBETH PALME: He didn't think there was any point in Olof's becoming an M.P.

OLOF PALMES (*smiles*): That's a good thought in itself.

The camera is loaded. The shooting resumes.

VILGOT: Well, take Sweden from this point of view:

Foreigners tend to think that we are very far ahead. Do you think we are?

OLOF PALME: Yes, somewhat. I mean, we're far ahead compared to other countries. And we're far ahead compared to what Sweden looked like thirty to forty years ago. But we have *not* gone very far if you want your dream of a classless society to come true. In that case, most of the work remains to be done!

Vilgot finds it difficult to concentrate. To tease him, Lena moves even closer to Magnus, looking at Vilgot with a big grin.

8. The cutting room

In order to be alone, Vilgot goes up to his cutting room at Sandrews. Evening. Silent and peaceful.

VILGOT (*voice over*): Isn't it sad that—in spite of a Social-Democratic government for thirty years—so little has been done?

Lena surprises him! She sneaks in and puts her hands on his shoulders. He becomes irritated.

VILGOT: No, not now!

LENA: Are you angry? (*Looks at him.*) Oh yes, you are angry!

Lena looks at a death notice taped to the editing table.

VILGOT SJÖMAN

BORN DECEMBER 2, 1924
DIED JUNE 9, 1974

THE FUNERAL HAS TAKEN PLACE

LENA: 1974? That's six or seven years from now! So you've decided to live that long?

VILGOT: Stop playing games, will you?

LENA: You *are* in a bad mood!

VILGOT: Hell yes! The way you and Magnus acted at Palme's!

LENA: What's this?

VILGOT: I really need some peace and quiet to be able to make this picture. Now if you sit there and—even if you're not doing anything—I just can't work.

LENA: Oh, I can't stand listening to Palme. I don't get what the hell he's talking about.

VILGOT: You could at least pretend, couldn't you? Now that we're making this picture, you could at least pretend to understand what it's all about.

LENA: Is that why you won't let me have a love scene with Magnus? Don't you want a girl for the lead?

VILGOT: Yes, I do.

LENA: And you want a girl in bed too?

VILGOT: Yes.

LENA: And if you manage to combine the two, that's just fine, eh?

VILGOT: So what? Don't you want the lead?

LENA: Yes.

VILGOT: And don't you want somebody in bed as well?

LENA: Yes.

VILGOT: So who's using whom?

LENA: We're using each other. But don't go and say it's on the same terms. Don't say that!

Vilgot cannot find any answer. He smiles and turns to the editing table. He begins to run a previously filmed interview for Lena.

This was made in March, 1966, when **MARTIN LUTHER KING, JR., AGE 37,** *was in Stockholm with Harry Belafonte to initiate a large Swedish fund-raising*

campaign for American Negroes. After a speech to students at Stockholm University, he took the time to answer some questions on non-violence.

VILGOT: Do you have to have a religious belief to take part in a non-violent movement?

MARTIN LUTHER KING: No, not necessarily.

VILGOT: If you find that a person cannot stand being attacked, what do you do with him? Do you speak to him

and explain to him that he cannot be with you any longer?

MARTIN LUTHER KING: Well, we always discourage those who cannot be subjected to attack—the one who would retaliate with violence—*not* to participate in a demonstration. The rules are very rigid in a non-violent movement and we feel that a person who can't take it—a person who cannot submit himself to violence if it comes to him and who would retaliate with violence—should not at all participate and so we discourage that person completely.

Lena seems fascinated by King.

LENA: I like him. He talks about better things than Palme.

Vilgot grimaces at the childish comment. But it gives him something to think about. In the forthcoming film, he wants to present Lena with three idols: a Russian, an American, and a Swede, to whom Lena turns for imaginary interviews when she is confused and depressed. Yevtushenko could be her Russian idol; Palme, her Swedish; and Martin Luther King, Jr., her American, because he represents the dream of non-violence. Non-violence should be another theme in the film, in contrast to the Swedish class system.

9. "If Sweden were occupied?"

Vilgot sends Lena and Ulla out to investigate what the general public knows about non-violence.

MAN IN GLASSES: Non-violence?
MAN: Non-violence?
MAN IN HAT: Non-violence?
ANOTHER MAN: Non-violence?
MAN IN COAT: Well, those hippies—aren't they involved in something like that?

Ulla asks two policemen on patrol.

ULLA: Have you ever heard of non-violence?
FIRST POLICEMAN: Non-violence?
ULLA: Yes.
FIRST POLICEMAN: No, I haven't.
SECOND POLICEMAN: No, I've never heard of it.

ULLA: Thank you.

Ulla asks a dock worker.

DOCK WORKER: Those who don't use violence? Well, I guess those are educated people who don't want to hurt others.

LADY IN BERET: Dr. Martin Luther King, for example.

ULLA: That's right. Do you know what methods he uses?

LADY IN CLOCHE HAT: Yes, he doesn't want to fight for his ideas.

Lena walks into an induction center. Boys eighteen and nineteen years old have to pass a physical examination before they are assigned to the Army, Navy, or Air Force—young boys ready for slaughter if Sweden is drawn into a war.

LENA: Have you ever thought of becoming a conscientious objector?

VOICE: No, I haven't.

SITTING BOY: No, never.

BOY AT THE WALL: No.

BARE-CHESTED BOY: No.

BOY WEARING CHAIN: No.

BOY IN TURTLE-NECK SWEATER: Oh yes, I have.

BLOND BOY: Like many others, I guess, I want to get out

as soon as possible. And it seems it would be sooner if I don't resist.

BOY IN SWEATER: You only have to serve longer if you refuse to bear arms.

A hot discussion is going on outside the induction center. A group of Provies is passing out handbills. They are explaining to another young man that there are loopholes in the new Swedish draft laws. One leaflet reads:* YOU ARE FREE FROM MILITARY DUTY, IF YOU . . .

A boy in uniform laughs at the young idealists.

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* From "provacateur." Originally a group of young people in Holland with leftist tendencies whose program was essentially anti-authoritarian and anarchistic. There are now groups of Provos all over Europe. In Sweden, they are called "Provies"—"pro" for; "vie" life.—*Trans.*

BOY IN UNIFORM: Yes, but the military pays me for ten months, and I get to be here in Stockholm. I have room and board and a great time. I'm through by 1:30 and then I can go down . . .

PROVO (*voice over*): And what's more important, you get to learn how to kill.

ANOTHER PROVO (*voice over*): You are part of a system, you know, and its main mission is killing.

A VOICE: We are part of a system of violence.

Lena appears, takes a handbill, and soon enters into the discussion.

BOY IN FUR COLLAR: We have no pat alternative to how to act in a war, but . . .

LENA: So you think we should keep our defense?

BOY IN FUR COLLAR: Absolutely not.

LENA: Why not refuse absolutely?

BOY IN FUR COLLAR: Sure, you should absolutely refuse military service. What you shouldn't refuse, though, is to work for peace with some civilian institution.

BOY IN CAP: There are alternative services. We encourage everyone to refuse to do *military* service.

Inside the induction center.

LENA: If Sweden were occupied, how do you think we should defend ourselves then? Do you think there is any way of continuing to fight?

BOY IN UNIFORM: But I have already explained that I'm not trained for combat, so they don't teach me things like that.

LENA: Do they teach it to those who are?

BOY IN UNIFORM: Probably. Ask them.

BOY IN SUIT: I don't know. I don't think so.

SHIRTLESS BOY: It depends on what rank you are in the military.

LENA: And what would you others do, if we were invaded?

ANOTHER BOY IN UNIFORM: You know, like, one should never surrender. Sweden won't give up. And all those radio messages and that kind of talk about Sweden being defeated, that's just nonsense and we shouldn't worry about it.

LENA: Is that what you're taught?

BOY IN UNIFORM: That's kind of number one on the program. It's in this "If the war comes"—the pamphlet that's distributed to everybody.

Lena gets very upset when she realizes how little the military knows about non-violence. She brings Ulla and Magnus along and goes out to demonstrate in the streets of Stockholm. They carry posters reading:

REFUSE TO KILL
REFUSE MILITARY SERVICE
LET NON-VIOLENCE BE YOUR DEFENSE

10. Lena opens an Institute

Lena and Ulla work on a pamphlet, IF WE ARE OCCUPIED, *in which they argue that Sweden ought to have a non-violent defense system. Lena teaches Ulla the first argument.*

LENA: If you can teach a whole country, all its inhabitants, then they have a much better chance this way!

They must learn that many of them will die, that lots of them will be tortured—but what's good about it is that *less* people will die in this war than in a war where everybody keeps throwing bombs at each other. Thus you can reduce the number of dead. And that must be worth a hell of a lot.

Where were we now?

She holds up a cloth on which she has lettered in outline:

THE GUILTY CONSCIENCE OF SOCIAL DEMOCRACY

ULLA: We have: Negotiation. Mediation. Demonstrations. Sit-ins. Lie-ins. Strikes. Counter-demonstrations. Hunger strikes. Sabotage. Economic and social boycotts. Tax refusal. Civil disobedience. Paralysis of the entire society.

Even more methods can be invented. However, the basic ideas of a non-violent defense system can be summed up in these three slogans, which are flashed on the screen:

NON-COOPERATION
SABOTAGE
FRATERNIZATION

LENA: "Underground government," is that on your list as well?

ULLA: Yes, I've got that too.

To whom are we going to send this pamphlet?

LENA: To the Swedish Commander-in-Chief. They must be out of their minds not teaching us things like that!

Lena and Ulla also discuss different methods of masturbation.

LENA: I tried the shower hose yesterday.

ULLA: Did you?

LENA: Mmm.

ULLA: How was it?

LENA: It didn't work at all.

ULLA: Did you hold it the right way?

LENA: I held it the way you said. Like this.

ULLA: How about the vacuum cleaner? I know a girl who always uses the vacuum cleaner.

LENA: No, I'd rather use a massage machine.

Magnus arrives; he pauses before a new sign by the door, NYMAN'S INSTITUTE. *He brings a tape recorder and a typewriter that he bought on the black market. The girls are delighted. Magnus is afraid that Lena's father, snoring on the couch in the kitchen, will wake up.*

MAGNUS: Sssh!

LENA: Oh, don't worry. He's asleep. Hey, Dad, there's a civil war in Spain! Listen, riots in Adalen, they're shooting down workers! . . . General strike!

Her father continues snoring.

Well, what did I tell you?

Lena has opened an "Institute." Magnus asks her what her plans are.

Well, you have to start on your own, see. *They* don't do anything. The newspapers work far too fast, so they can't be trusted. And science works far too slowly, so you can't expect to get any results there. You've got to start on your own.

Hey, Magnus, will you start with the stencils?

MAGNUS (*picking up the empty black bag*): Lena, what's this bag?

Lena has had a bright idea. The Social Democrats have been in power in Sweden for thirty years. In spite of that, they have only carried out a few of their ideas. Lena is making a big, black bag which she calls "The Guilty Conscience of Social Democracy." She's going to fill it with everything she finds that belongs there. The audience is invited to take part.

SPEAKER (*voice over*): We announce a fantastic contest.

Various slogans are flashed on the screen.

SHARPEN YOUR MEMORY
SHARPEN YOUR MIND
WHAT IS LENA HIDING IN THE BAG?

SPEAKER (*voice over*): First prize: your own cabana in Spain. Second prize: a luxury cruise around the world. Third prize: a week of gymnastics with Princess Birgitta.

11. Lena protests

On the street, Lena, holding a microphone, scolds an opponent.

LENA: Do you really think people lose their desire to work just because of a tax increase? That they will stop working just because they don't make a hell of a lot of money? Don't you think that their *jobs* mean anything

to them? Are you that fucking stupid? Do you know what I think? (*Sounding as if the opponent had a dread disease.*) I think you're *conservative.*

From various points in Hötorget Square in the center of Stockholm, Lena, Ulla, and Magnus hold a summer clearance sale of the conservative newspaper. One after the other they call out their slogans.

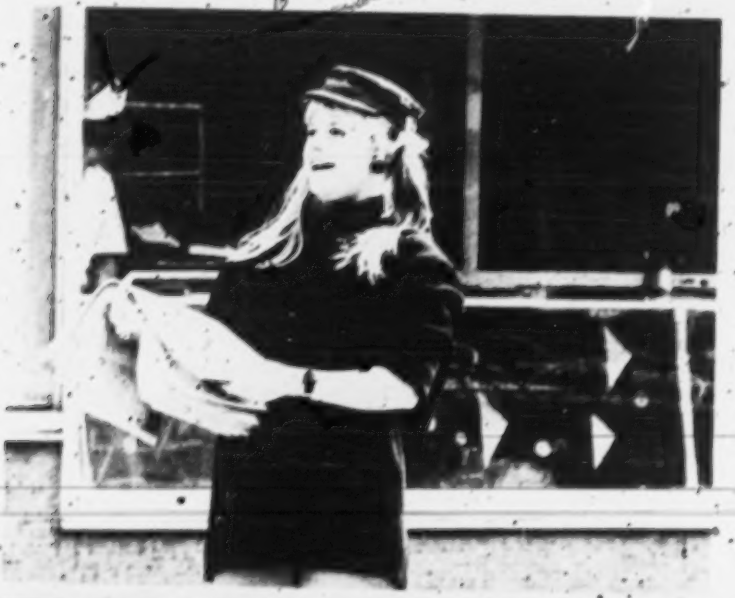
LENA, ULLA, AND MAGNUS: *Svenska Dagbladet* gives you Sweden's most ancient points of view.

A newspaper with gout, *Svenska Dagbladet!*

Buy *Svenska Dagbladet*, the newspaper with gout!

An airplane passes overhead; a banner attached to it carries the slogan:

CONSERVATIVE STUDENTS



Svenska Dagbladet gives you Sweden's most ancient points of view daily.

New, improved—with gout!

Lena attacks the Great Injustice.

LENA: Some people were born with very little talent. They are lost, sort of butterfingered and brainless. Others, on the other hand, have altogether different qualifications. From the very moment they were born they had brains and talent. Should they be *rewarded* for that? So that they later on get the better jobs and the higher incomes? They get to do what they like and they have better opportunities in society. Shouldn't you *do something* about this?

Magnus pretends that he is from Expressen, *a news-*

paper that exploits political and social scandals. He stands in a doorway, talking to a middle-aged housewife:

MAGNUS: Good afternoon! I wonder if you have any interesting welfare cases in this block? People living in crummy little pads or people who have unpaid dentist bills? Junkies are okay too. You see, I'm working for *Expressen* and we are now arranging for the Conservatives to win the 1968 election. We are preparing a series

about the ten filthiest welfare cases. Could you help me out? (*The door slams.*)

Lena encounters a pessimistic doctor.

DOCTOR: Well, the class system. I guess that will always be with us.

LENA: But shouldn't we do anything about it?

DOCTOR: No, I hardly think so.

LENA: Why not?

DOCTOR (*shrugging*): Well, it turns up everywhere anyway, even where we try to get rid of it. Take Russia, for example! Now they have it again. You can have a house, you can have a profession, and many people are much better off than others, and so on.

LENA: But why shouldn't we do anything about it?

DOCTOR: Well, you can see that even under the worst conditions we have not been able to eliminate it.

Lena, Magnus, and Ulla demonstrate on the sidewalk, carrying posters.

LENA (*voice over*): I didn't like what he said, so I went to the Russian Embassy with a simple question.

One poster reads:

HAVE YOU ESTABLISHED A NEW CLASS SYSTEM?

12. Lena hates Franco

The three of them picket various travel agencies, including one which specializes in promoting tours to Spain. Their posters read:

DO YOU REMEMBER THE CIVIL WAR?
IT WAS FRANCO WHO WON
DO YOU LIKE FRANCO?
SALAZAR IS HIS BUDDY

Lena goes to Arlanda, Stockholm's airport, to try to make tourists face their responsibilities. Two planes have just landed with tourists returning from Spain. Lena confronts them.

LENA: Aren't you ashamed of going to a fascist dictatorial state?

MAN (*beaming*): Am I ashamed of going there?

LENA: Yes, aren't you ashamed?

MAN: No, absolutely not.

MAN IN FUR HAT: No, why should I be ashamed?

LENA: Because Franco is there! Because of his regime!

LADY: I think there are certain trends toward dictatorship in this country as well, when a bottle of whisky costs fifty kroner. That's a kind of dictatorship, too, you know.

LADY IN CROCHETED HAT: Yes, we were so confused. We thought of Israel for a while, but that was even more expensive . . .

LADY'S MALE COMPANION: I find it really very hard to take a stand . . .

LADY IN CROCHETED HAT: . . . so that decided it.

LENA: How do you think they're doing, the people in Spain?

ELDERLY GENTLEMAN: Oh, they're doing just fine.

LENA: Mmm.

MAN IN HAT AND GLASSES: They don't look so unhappy.

ANOTHER MAN: On Grand Canary they don't seem to be starving.

YOUNG BLONDE: They're very poor.

LENA: How do you like Franco?

MAN IN HAT AND GLASSES: I won't say anything about that.

LENA: Why not?

YOUNG MAN (*smiling*): Why should I?

LENA: Well, why shouldn't you? If you really have any opinion. Maybe you don't have one?

YOUNG MAN: No, I don't think I do.

MAN IN SUNGLASSES: I'd rather not talk about him.

LENA: Why not?

MAN IN SUNGLASSES: What?

LENA: Why not?

ANOTHER TOURIST: If you ask a Spaniard what he thinks about Franco, he'll say: "Franco is fine!"

LENA, THE TOURIST (*together*): Do you know what'd happen to him if he said anything else? Quiet! Quiet, I say!

LENA: Have you ever thought about Franco?

MAN WITH SUNTAN (*seriously*): I have never even thought about you.

LENA: About Franco?

MAN WITH SUNTAN: About Franco?

LENA: What do you think of Franco?

MAN WITH SUNTAN: Do *you* know Franco?

LENA: No.

MAN WITH SUNTAN: Neither do I.

LENA: But what do you think of his politics? What do you think of his regime?

MAN WITH SUNTAN: I've been on a vacation. I haven't been talking politics.

ANOTHER BLONDE: After all, you go there to swim and rest, not to get tangled up in politics.

BALDING MAN: No, I went there for a vacation—to sunbathe and swim.

MAN IN HAT AND GLASSES: I don't care at all about such things.

LENA: N

MAN IN FUR HAT: You forget all about it when you're down there.

LENA: Oh, you do?

MAN IN FUR HAT: You sure do.

LENA: So you just don't give a shit about it, eh?

MAN IN FUR HAT: That's right.

MAN IN DARK SHIRT: Well, I wouldn't say "shit." You just say "We're off!"

LENA: So you have no opinion?

FIRST MAN: None whatsoever.

LENA: You don't care if a whole country and all its inhabitants suffer like hell under a dictator?

FIRST MAN: No, I wouldn't say that, but I just don't want to get *involved*, that's all.

Lena, Magnus, and Ulla picket the Spanish Tourist Office.

BOYCOTT TRIPS TO SPAIN
A MALLORCA VACATION IS A SCANDAL
YOU ARE PARASITES ON THE SPANISH WORKERS
SPREAD SOCIALISM IN SPAIN!

13. The picture-frame shop

Lena needs money. After leaving Arlanda, she visits her father, Rune, at his job in an old picture-frame shop. Tired and withdrawn, Rune stands in the back room making frames.

LENA: Did you hear what I said?

RUNE: Yes. What do you want with that much money all of a sudden?

LENA: I'm going to a hypnotist!

Rune snorts.

Don't you think you ought to pay me back what you borrowed?

RUNE: Sure, but . . . Listen, don't I give you a few kroner now and then?

LENA: Yes, a few kroner now and then!

RUNE: What do you expect me to pay the rent with?
LENA (*shouting*): But I've got to have it today.

Rune tries to quiet her. She says, calmer:

You've promised me at least ten times that I'd get it back and I haven't gotten it yet.

RUNE: Sssh.
LENA: It's three months now since you borrowed it. You've said that every damn time!
RUNE: Yes, yes, all right!
LENA: Well, give it to me then!

Rune leaves the workroom and goes to the proprietor's desk at the rear of the shop.

PROPRIETOR: Listen, there's an errand to be run.
RUNE: I need a hundred in advance.
PROPRIETOR: Well, not right now.

RUNE: What's the errand?

PROPRIETOR: To the picture restorer.

RUNE: Yes, yes. (*To Lena:*) Listen! I've got to run an errand.

Contemptuously, Lena watches her father leave the shop. As she walks out, she pays no attention to a customer who has been watching her all this time: a young man who has been waiting for a newly framed watercolor.

14. Factory sabotage

Bo Holmström, a well-known television reporter, is making an imaginary Utopian TV series on the non-violent defense system which may be introduced in Sweden. Right now he's interviewing a worker in a factory outside Stockholm.

BO HOLMSTRÖM: This is foreman Evert Svensson, who is

also a part of the factory defense. (*To Svensson:*) What is your job here?

SVENSSON: My job is to sabotage this machinery.

A title appears on screen.

SABOTAGE

HOLMSTRÖM: What kind of machinery is this?

SVENSSON: These are machines that produce these things for diesel and jet motors.

HOLMSTRÖM: Delicate things?

SVENSSON: Yes, very. There are electronic systems here that are extremely delicate.

HOLMSTRÖM: Can you explain how you'll sabotage this machinery?

SVENSSON: I can show you here.

HOLMSTRÖM: Yes.

SVENSSON: Well, this is a relay, you see. If you only damage a very small part in this relay, the whole machine will be put out of use.

NON-COOPERATION

HOLMSTRÖM: Is it hard to find the damage?

SVENSSON: Yes, very. Then it's my job to delay the repairs as long as possible.

HOLMSTRÖM: Is this just a small part of a big sabotage plan?

SVENSSON: Yes. This is just a part of it. There are many possible ways of doing it.

HOLMSTRÖM: Don't you think the enemy would get rid of you immediately if they were to occupy Sweden?

SVENSSON: Don't be too sure of that. You have to separate the idea from the individual. We shall fight the enemy's ideas . . .

FRATERNIZATION

. . . but we'll make friends with the enemy soldiers.

HOLMSTRÖM: Do you believe in non-violent defense?

SVENSSON: Yes, I do. I've taken a course in non-violent resistance, and it seems right and sensible, I think.

HOLMSTRÖM: You are a former member of the regular military defense system?

SVENSSON: Yes.

HOLMSTRÖM: But you prefer non-violence?

SVENSSON: Yes, I do. I think that if you can show how efficiently we have built up our sabotage system, the enemy will respect Sweden.

HOLMSTRÖM: Does this sabotage have serious consequences?

SVENSSON: It has enormous consequences. It prevents the new planes from flying and the new buses from running.

15. Lena meets Börje

Lena has recorded the TV program on her tape recorder, and has been listening to it as she cut out white letters to paste on the black bag. These will read:

THE GUILTY CONSCIENCE OF SOCIAL DEMOCRACY

She hears the door open.

Her father comes home. He has brought the young man from the frame shop home with him. The boy's name is Börje. But Lena doesn't want to speak to anybody. She slams her door and tells her father to go to hell. She tacks

a clipping to a shelf above her bed. It reads:

I AM FREE

Her father sets out beer and sandwiches on the kitchen table. He starts talking about Sweden's inadequate social welfare, having just read in a newspaper that several hundred blind people were discovered who had never received assistance from any organization.

RUNE: Listen! They're blind themselves.

BÖRJE: The bureaucrats?

RUNE: Sure. They're the ones who investigated this. And I wonder too why people who really can see something don't take care of them. And just think of how many there must be left of those who . . . There are lots of blind people in Sweden.

BÖRJE: Yes, yes.

RUNE: We keep sending money to all the underdeveloped countries, but why not look after your own home first, eh? What do you say about that? Why don't we look after our own country before we start talking about other countries?

BÖRJE: Oh yes, the underdeveloped countries.

RUNE: And then those people have to be retrained and given new jobs: office jobs, metalworking jobs, and darkroom jobs. Not that I know what they're trying to do but . . . Well, darkroom jobs I can understand. But a metalworker. I mean, if he stands at a lathe he has to be sensitive, so that he doesn't . . . Well, I don't know how it works.

During this conversation Lena has sauntered into the kitchen and washed down a diet pill with a glass of water. Börje eyes her with interest but she pays no atten-

tion. Finally she sits on the edge of the sink and crunches away at a piece of hard bread. Suddenly she interrupts her father and asks Börje:

LENA: What do you do?
RUNE: He works in a men's shop.

BÖRJE: At Ryden's.

LENA: Is it fun?

BÖRJE: Sometimes. It's on Kungsgatan.*

LENA: Then what's the matter?

BÖRJE: Well, your Dad and I were talking at the café about my job.

LENA: About your men's shop?

BÖRJE: Yes.

RUNE: This is a fine guy, you know.

LENA: Yeah, he may very well be, even though he works in a shop.

BÖRJE: Hey, listen! Can I have a look at your room?

RUNE: Sure, go on! But it's a mess in there.

BÖRJE: Okay?

LENA: Okay.

When Börje disappears into Lena's archive, her father takes a small roll of bills out of his pocket.

RUNE: Here's the money you were yakking about.

LENA: Where did you get it?

Rune won't answer.

Lena counts the bills. There should be 100 kroner. She throws them back at him.

Only ninety-five.

RUNE (*looks at her*): Sometimes you're too much like your mother.

During this, Börje wanders about in Lena's archive. Piles of books, walls covered with posters, boxes full of newspaper clippings and other junk. He stares amazed at a portrait of Generalissimo Franco hanging in a gilded frame surrounded by a wilted laurel wreath. That is Börje's first question when Lena comes into the room.

* A fashionable street.—*Trans.*

BÖRJE: Why do you have Franco on the wall?

As Lena's black bag comes into view, so does this title:

THE CONTEST

BÖRJE: What are all these boxes?
LENA: My files.
BÖRJE: And that one there? What does "R" stand for?
LENA: Religion.
BÖRJE: Well, there isn't much in it.
LENA: No, I've just started on it.
BÖRJE: "M" then?
LENA: Men!
BÖRJE: Do you collect men?
LENA: No, but I used to.

They exchange smiling glances.
In the kitchen, her father chews on a cheese sandwich.

Det bästa i Stockholm

When he goes to join the kids in the other room, he pauses in the doorway: he sees them embracing in a corner and hears them murmuring together.

BÖRJE: Hey, you're beautiful.

Rune decides to leave them in peace. But before going back to work, he picks up the money Lena refused. The door slams.

Did he leave?

LENA: Mmm. He went back to work.

BÖRJE: Maybe I should go too?

LENA (*smiles agreeably, clinging to him*): Mmm.

BÖRJE: What do you think?

LENA: Mmm.

BÖRJE: No?

LENA: Yes.

Their embraces continue. Börje can't unbutton Lena's slacks. Lena thinks that Börje is clumsy. She has to do it herself.

BÖRJE: Thank you.

Finally, they both get their pants off. Börje tries to lift Lena against the wall. Lena finds the position uncomfortable.

LENA: No.
BÖRJE: Yes.
LENA: No, it doesn't work.
BÖRJE: It doesn't?
LENA: No, it won't work.
BÖRJE: It'll work.

Lena pulls away from Börje and disappears into the closet, her panties and slacks around her ankles. There is

a terrible racket inside as cartons and boxes fall. Lena comes out with a mattress. She intends to make a bed on the floor. Börje stares in astonishment at what she is doing. His trousers are tangled around his ankles.

LENA: Help me then!

He moves the tape recorder.

God, you're slow!

BÖRJE: I'm doing my best.

LENA: Hurry up!

Magnus arrives on the stairway outside with two enormous stacks of books tied in bundles. He finds a notice on the door:

NYMAN'S INSTITUTE
CLOSED FOR LUNCH (ALL AFTERNOON)

He sits on a stool and waits for Lena to re-open her institute.

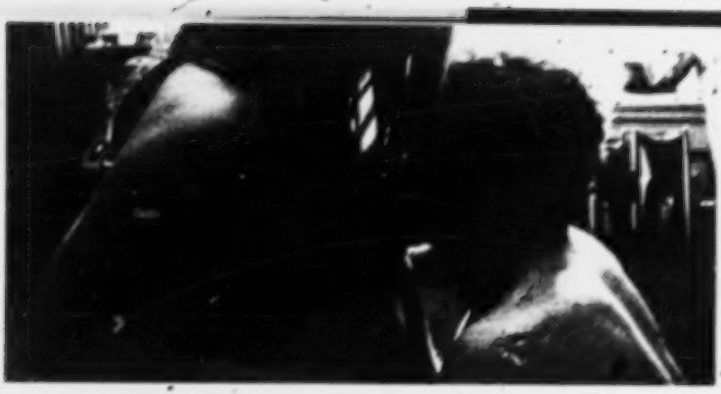
Inside, the bed is being made.

LENA: Should we have sheets?

BÖRJE: Yes, one.

LENA: Pillow?

BÖRJE: Yes, a pillow.



Rapid undressing. Lena's bra is twisted. Börje is only too willing to help.

No, I'll do it. I'll do it. (*When he sees Lena's breasts, he exclaims softly.*)

Lena is particular. She always takes off the boy's wrist watch before she goes to bed with him. Only then is she ready to continue their lovemaking.

Interruption. A female announcer appears on the television screen. It seems there is a faulty coupling . . .

ANNOUNCER: We are sorry that we have had some technical difficulties in the south of Sweden during the last hour.

Late in the evening in Lena's archive. They lie on the floor, tired and naked, quieting their hunger by nibbling

on a chicken leg. Lena takes down a photograph of her father when he was young and shows it to Börje.

LENA: And a socialist. He was damned active too.

BÖRJE: Mmm.

LENA: He belonged to a lot of youth groups. And he sang.

BÖRJE: Oh, did he!

LENA: And he sang very well. And he read poems. Then he took off for Spain to fight in the Civil War. The International Brigade.

BÖRJE: I see. How long was he there?

LENA: Three weeks.

BÖRJE: Was he wounded?

LENA: No.

BÖRJE: Well, why'd he come back so soon?

LENA: I don't know.

BÖRJE: Have you asked him?

LENA: Sure, but he doesn't answer.

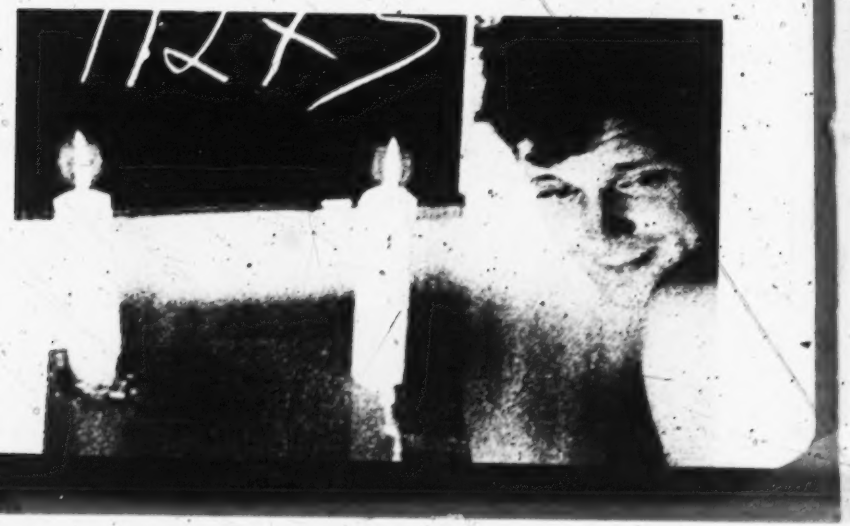
They prick up their ears. A doorknob is turned. Her father has come home. He hears that Lena still has a visitor and quietly closes the kitchen door. Börje rises and closes the archive door, just as discreetly. While doing this, he notices Franco's portrait again.

BÖRJE: Isn't it pretty nasty then to have Franco on the wall?

LENA: Yes.

Under the picture, Börje notices Lena's altar. Two candles, photographs from German concentration camps, and a blackboard (The Great Scandal Board), on which Lena inscribes the number of days that have passed since her father came back from Spain.

BÖRJE: Why do you have pictures from concentration camps?



LENA: Doesn't that go together with Franco?

BÖRJE: 11,273 . . .

LENA: . . . days since he chickened out on the Spanish Civil War. *(Lena is holding a pad and pencil.)* Do you have a license?

BÖRJE: Eh?

Börje turns his head: why does she ask that? Because Lena registers the boys she sleeps with. She interviews them and enters them into a card file.

LENA: Do you have a driver's license?

BÖRJE: Yes, I have.

LENA: Did you take your first Communion?

BÖRJE: Yes, I did.

LENA: Did you ever consider refusing military service?

BÖRJE *(lies)*: Yes.

Börje looks at the pictures from the Vietnam war that Lena has pinned up over her bed: soldiers, weapons, agony, torture, abandoned children.

How can you sleep with all these pictures hanging over your head?

LENA *(ignoring the question)*: Do you think that women should earn the same wages as men?

BÖRJE: No.

LENA: Equal sexual freedom?

BÖRJE: Yes.

LENA: Are you married?

BÖRJE: No.

LENA: Should the Swedish Church be separated from the State?

BÖRJE: No.

LENA: Should the monarchy be abolished?

BÖRJE: No.

LENA: What party did you vote for in the last election?

BÖRJE: The Conservative.

LENA: And in the election before that?

BÖRJE: The Liberal.

LENA: Do you think that Swedish society has a class structure?

BÖRJE: No, absolutely not.

LENA: Where did you get to know my father?

BÖRJE: At the frame shop. Then we went to a café and talked. (*He takes a card at random from the file.*) Stig Björkman, born 1941, confirmed. He has a driver's license.

LENA: Did Dad borrow money from you?

BÖRJE: Yes.

LENA: I could have bet my sweet life on that.

BÖRJE (*handing her a glass of wine*): Skål, Lena! Skål!

LENA: When did you turn on to me?

BÖRJE: At the frame shop.

LENA: Do you think I was good?

BÖRJE: You were great! You were great!

LENA: How many girls have you slept with?

BÖRJE: I don't know. I've never counted them. Have you?

LENA: Mmm.

BÖRJE: Well, how many boys are there?

LENA: Twenty-three. But the first nineteen were no fun.

BÖRJE: I see.

LENA: No fun.
BORJE: So, I'm number twenty-four?
LENA: Mmm.

?
23?

We interrupt for an imaginary special meeting at the BOARD OF FILM CENSORS *in Stockholm. When this film reaches the Board, Lena's number causes a problem. We see Mr. Erik Skoglund, 63, young film censor, checking the rules and regulations; his co-workers wonder if the number was true or to be taken as a boast. Some even begin to count on their fingers.*

DID SHE SAY 23?

In any case, Mr. Skoglund decides not to question the figure before he seeks advice from his fellow-censor, Pastor Gunnar Dahmén, a representative of the Swedish Church.

Dawn in Lena's archive. It is 1:30 A.M. *Börje coughs in his sleep, wakes up, and shivers a bit. He puts a blanket over Lena, but she awakens also.*

LENA (*whispers*): What is it?
BORJE (*whispers*): Hey, Lena, I'm off now.
LENA: No.
BORJE: I've got to go now, you see.
LENA: No, don't go.
BORJE: Listen, I've got to go.
LENA: No.
BORJE: I'm serious, I've got to leave. It's late! Listen Lena, I've got to run now. You lie down and go back to sleep.
LENA: No, I'll come with you.
BORJE: Okay, but make it quick, make it . . .
LENA: Mmm.
BORJE: You've got to make it quick. Clothes on, quickly.
LENA: Mmm. Mmm.

BÖRJE: Quickly.

LENA: Mmm.

BÖRJE: Where are my trousers? Where the hell are my trousers?

LENA: And my bra?

BÖRJE: You can go without one.

LENA: Yes.

Lena's father awakens in the kitchen. He wanders sleepily to the sink and pisses in the basin. Some voices are heard in the courtyard: good friends of his who want to come up for a beer. But he waves them away. He can't have them up when Lena has a boyfriend in there.

Because it is a new day Lena must change 11,273 to 11,274 before she steals out with Börje. Her father, by the sink, nods in a friendly way.

Once he hears them leave, he waves to his friends in the

yard. It's okay now! Come on up! The kids are gone!

This is Tuesday, June 14. Sunrise 2:35 A.M. *Temperature in Stockholm 62° F. And with Börje in back on the luggage carrier, Lena cycles through an empty Stockholm at dawn.*

They pause by the Royal Palace and watch the changing

of the guard. Leaning over the stone balcony, they regard the quietness.

LENA *(croons)*: "In Rio de Janeiro you can *folk* for free . . ."

Panoramic views of the Parliament, the biggest banking houses, the Opera, the Grand Hotel, various waterways, and a crowd of seagulls chattering as they pass.

LENA *(voice over)*: Now the Prime Minister gets up to take care of Sweden.

And the Minister of Trade wakes up.

And all the Lefties.

And the whole mixed economy.

The Conservative party leader rubs his eyes because he's had a nightmare.

And Torsten Eriksson * gets up and makes pee-pee; and begins devising another defense of the new State Prison at Kumla.

And Per Wrigstad † vomits again in *Expressen*.

Börje thinks. He thinks that he and Lena have been together exactly half a day, from lunch yesterday. Shall they end the idyll here? Put the finishing touches on the masterwork, the cork in the bottle, so to speak?

He whispers his idea in Lena's ear. She gladly nods yes. Börje takes off his jacket; Lena takes off her panties. A watching Palace guard swallows, his Adam's apple bobbing. After Börje places his jacket over Lena's shoulders, they swing up onto the balustrade in front of the Palace and rock in each other's arms, while the guard continues to watch impassively.

* The Head of the Bureau of Prisons who is under heavy attack from Swedish radicals for blocking further reforms.—*Trans.*

† The editor-in-chief, who uses his newspaper for vulgar anti-socialist propaganda. His favorite target: Olof Palme.—*Trans.*

A choir sings the national anthem, "The King's Song."
"From the depth of Swedish hearts we sing
A simple hymn unto our King.
Show faith in him! Don't let him down!
Lighten the burden of his crown!"
And Lena wonders how things are going with the King.
Why not go into the Palace and interview him?

16. Lena comforts the King

An imaginary interview.

There is a collection of family portraits on a table in one of the Palace chambers. One is of Carl Gustaf, the crown prince, who looks remarkably like Börje.

His Majesty is walking through the chambers of the Palace, a suitcase in each hand; a Pekinese trots after him. A music box is playing softly. He has just finished his long service, now that the Kingdom of Sweden has been turned into a republic. The court has been pensioned off. Now he needs his grandson to help with his departure.

THE KING: Carl Gustaf, where are you?

Lena hurries up, microphone in hand.

LENA: Is there anything I can do?

THE KING: No, it's all right. I'm ready. Is it chilly outside?

LENA: No, Your Majesty, it's a nice Swedish summer morning.

THE KING: A bit chilly then.

LENA: Yes, a bit.

THE KING: If only Carl Gustaf would come with the tickets. He promised to take care of them. The last thing he was to do yesterday was to go to the travel agency.

LENA: I know that I'm intruding. But may I just ask what it feels like?

THE KING: What it feels like? What do you mean?

LENA: We've had kings in Sweden for a billion years. How does it feel to be absolutely the last one?

THE KING: If you give me a moment to consider, I'll find an answer for you. (*He sets down his bags.*) Well, it's like this: It's important to separate the idea from the individual. That's something we have to learn from early childhood. I've been trying all my life to separate

these two things. I've really made an effort. (*He picks up his bags.*) But sometimes it's difficult. Very difficult.

LENA: But Nancy Eriksson * explained it on TV, and all the socialists said it too: It isn't *you* as a *person* they wanted to get at. On the contrary, you have been an outstanding representative of . . .

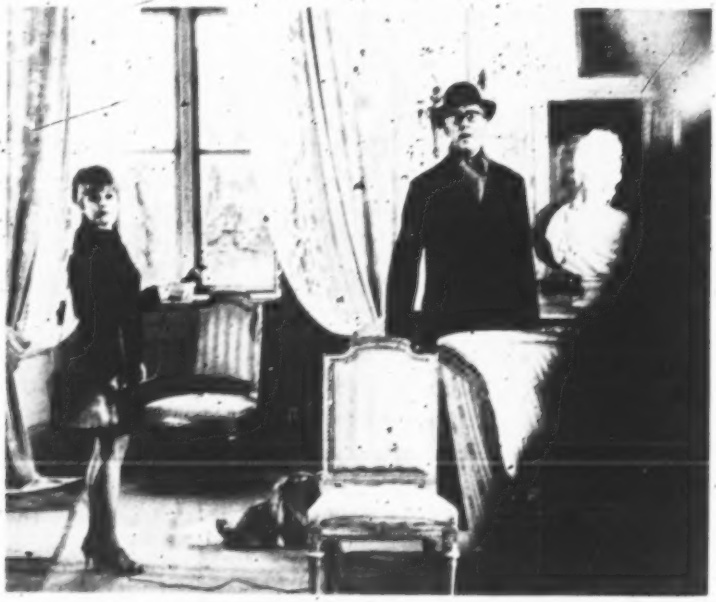
THE KING: Yes, yes, I know.

And then it happens. In comes the "Prince." And he looks remarkably *like Börje.*

A VOICE: Grandfather!

THE KING: Yes, I'm here. Where have you been? I thought you had forgotten . . .

* The Social Democratic Party in Sweden has always had as part of its program: Abolish the Kingship. However, the issue was shelved for several decades. Not until the mid-sixties was it taken down and dusted off. A group of M.P.'s led by Nancy Eriksson moved for an investigation of the "Kingship question."—*Trans.*



BÖRJE (*as Crown Prince Carl Gustaf*): Well, I . . . Here they are anyway.

He gives the plane tickets to his "Grandfather," the King; then turns to Lena and whispers.

BÖRJE (*as the Prince*): It's been delightful meeting you, Lena, but I'm tired, so I've got to take a nap. (*Börje as Börje.*) We're having a sale at Ryden's, you see. (*As the Prince again.*) Delightful meeting you.

LENA: But what about *you?* How do you feel? Just think of not being able to be anything but a crown prince.

BÖRJE: I don't give a damn about that! (*Walks away, pauses, turns.*) Will you call me?

LENA: Where?

BÖRJE: At Ryden's. It's in the phone book. (*He disappears.*)

THE KING: I hope it's nice in Italy now. Not too hot. At the airport in Rome it's usually . . .

LENA: I think it's just great down there now. I wouldn't mind going myself, if only I could get away, but with the Institute and all the investigations . . . Come along! Mind the step, now. (*To the Pekinese.*) Is your master taking you to Italy? . . .

17. Marie

The same morning. A small apartment. A blonde young woman is brushing the hair of her three-year-old daughter before giving her breakfast. A key turns in the lock.

MARIE: Who's coming? Who's coming?
GIRL: Daddy?
MARIE: Yes.

BÖRJE: Hello.
MARIE: Hello.
GIRL: Daddy?
MARIE: Yes.
GIRL: It is Daddy.
MARIE: Yes, it is Daddy.
A VOICE FROM THE RADIO: Sartre meant that the Tribunal would investigate what sentences should be passed if

the laws used at the Nüremburg trials were applied to the aggressors in Vietnam.

"We represent no government, no party, and therefore we take orders from no one." These were Jean-Paul Sartre's words at the opening of the Russell Tribunal in Stockholm.

"We are powerless," he said, "and in that lies the guarantee of our independence."

Börje turns off the radio. He stretches out on the bed, tired after being awake all night with Lena. In the kitchen, Marie empties the contents of a can into a bowl in front of the child.

GIRL: No, I want food.

MARIE: But this is food. Now eat like a good girl! (*To Börje:*) Would you like something too? A sandwich?

BÖRJE: Yes, please.

MARIE: A beer?

BÖRJE: Mmm.

Marie takes a beer from the refrigerator. Börje gives her a package. It is the picture he had picked up at the frame shop the day before during his lunch hour. Marie recognizes the watercolor. She painted it a few years ago. She is shy but a little moved by his thoughtfulness.

MARIE: Did you frame this?

BÖRJE: Like it?

MARIE: I paint a lot better now.

BÖRJE: Yes, but it's nice.

MARIE: Yes, we had a wonderful time that afternoon, anyway.

BÖRJE: Are you happy?

MARIE: Yes.

Börje kisses Marie. Their daughter laughs, delighted.

18. Lena and The Universal Problem

LENA (*voice over*): Occasionally, I was negligent with The Great Scandal Board. But all of a sudden something would remind me of how my old man chickened out on the Spanish Civil War and . . .

The count on the board increases: 11,274, 11,275, 11,276, etc., through 11,283.

Besides, I think that you should make your opinion clear to the world. So Ulla, Magnus, and I went to the big embassies. In front of the American Embassy there was a police car. There was always a police car there, all summer.

The signs say:

EVEN SWEDEN ONCE BELIEVED IN THE U.S.
NOW WE ARE ASHAMED
DO YOU KNOW WHY?

LENA (*voice over*): I told the police that I wasn't out looking for trouble, simply taking an intellectual position. But since the cops didn't understand the difference, it was quite a short demonstration.

Lena joins a protest march of writers, students, and

ÄCKSA SVERIGE HAR TROTT PÅ USA

NI VET VARFÖR

NU SKÄMS VI

youths chanting "U.S.A. murderers! U.S.A. murderers! U.S.A. murderers!" Many of the signs read:

U.S.A. GET OUT OF VIETNAM!

Lena also makes new posters for the communist embassies.

I LIKE COMMUNISM WITHOUT SLAVE CAMPS

I LIKE SOCIALISM WITHOUT TYRANNY

LENA (*voice over*): The next day we went to the Chinese Embassy at Bragevägen. After that I went to the Russian Embassy to talk to the Ambassador himself; he wasn't in.

But Yevtushenko was there. He said that my signs were ridiculous.

Lena gets very upset and has an imaginary interview with Yevtushenko and his interpreter.

LENA: What! What does he mean?

INTERPRETER: Well, what he means is very simple. Millions of people all over the world today are starving, living under conditions so miserable that you, Lena Nyman, would never accept them—not even for five minutes. Now, if you chose the capitalistic solution—then you have free enterprise, free speech, and a lot of other good things. But that development would take

300 years.

LENA: So let it then.

Yevtushenko responds in dismay and disbelief.

INTERPRETER: But don't you see? It has to be done in thirty years. In thirty years illiteracy must be eliminated. In thirty years the country must be industrialized—and

you think this could be done without compulsion!

No! But Lena, you mustn't forget that compulsion isn't the same to you as it is to them. They've had the whip over them for a thousand years, so another thirty years doesn't mean a thing, as long as they believe there will really be a change.

LENA: But what about the purges and the murders! And people being deported? The slave camps? *(To the in-*

terpreter:) Look at his country under Stalin! He has written poetry himself about the terror they endured. Can he deny that? (*To Yevtushenko:*) Can you deny that?

INTERPRETER: No, he doesn't deny that. He says it is sad that the new Soviet had to be born with so much sacrifice, but one has to take risks.

LENA: Risks! Doesn't he realize what hideous risks he's talking about?

INTERPRETER: Oh yes, he certainly does. But realizing that millions of people are starving to death, do you think that's taking less of a hideous risk?

Lena looks down, ashamed.

LENA (*voice over*): Well, there I was with my fear of the Russians and the Chinese, and what she said was probably right. That was more than I could take.

19. A cosy evening

Lena is with her father in the frame shop. He has been working late. Now he's washing up. He turns his shirt inside-out before going out to grab a bite to eat. Lena is hand-printing little cards for her files, but cuts the board incorrectly.

RUNE: When my old man died, I was with . . . No, wait a minute, wait now. You mustn't do it that way, don't you realize that it's much harder that way! You should only draw a fine line first. Like this, see? You do it like this! Then you press hard. Like this. (*Continues his story.*) Yes, when my old man died, I was in the room lying beside him in the bed. He lay there, tossing and turning, and I woke up twice during the night. I only thought he was a little restless, but when I woke up the next morning his neck had turned blue.

LENA: Do you think animals feel the same way as we do when they die?

RUNE: Oh yes, sure they do. I was at a bullfight in Spain once, and I almost puked. I had to leave. Oh, come on, have some wine! (*He hands her the bottle; then he takes a drink himself.*)

LENA: What do you think of Börje?

RUNE: Mmm.

LENA: Do you like him?

RUNE: Mmm.

LENA: He's kind of groovy.

RUNE: Yes, he's a fine boy.

LENA: Mmm. I'm getting kind of turned on to him. (*She giggles.*)

RUNE (*laughs*): Do you think I didn't see anything through the door before I left that day?

LENA (*laughing*): No!

RUNE: Oh yes, I did!

LENA: No!

RUNE: Oh yes!

LENA: I see.

RUNE: But listen, what's important with that guy is that . . . At the café before . . . well, he talked so nicely about his child. He talked so nicely about her.

Lena's father doesn't notice that she suddenly looks gloomy.

Just like I felt about you when you were little and your mother ran off.

ENA: Oh, that bitch!

UNE: Oh well, she was all right . . .

ENA: No, she wasn't—showing up after eight years and wanting me back!

RUNE (*sings*): "Here I sat on the river bank—
I'm singing: tra la la . . . to myself—
Listening to the river surging in the valley—
I hear him calling—"

LENA: What's her name, that woman?

RUNE (*sings*): ". . . tra la la . . ."
What?

LENA: The kid's mother?

RUNE: I think it was Marie or something like that. (*Sings:*)
"I'll take my violin—
Let the river be my bass—"

LENA (*in a sudden outburst*): What the hell does he want with me then, when he's got both Marie and . . . That damn . . .

RUNE: Yes, but listen, you've been experimenting yourself!

LENA: Yes, but that's a completely different thing! At least I say when I'm experimenting! But that bastard hasn't said a thing! Everybody else . . . Hell, even *you* know! But I don't . . .

RUNE (*sings*): "Dear old river surging in the valley—
We are old, you and I, and rather gray.
Girls want young lovers

Who are fast and light on their feet.
Our days are over . . ."

Lena, melancholy, gently straightens the collar of her father's inside out shirt.

LENA: Have you put it on inside out again?

RUNE (*sings*): ". . . And in our nook we sit and watch
The young people dancing.

Our days are over.
And in our nook we sit and watch
The young people dancing."

20. A TV program

ANNOUNCER (*on screen*): We regret having to interrupt this program with a message.

BO HOLMSTRÖM (*in a studio*): After one of the most intensive debates that the Swedish government has experienced, we can now give you the results of the vote on the new radical defense system.

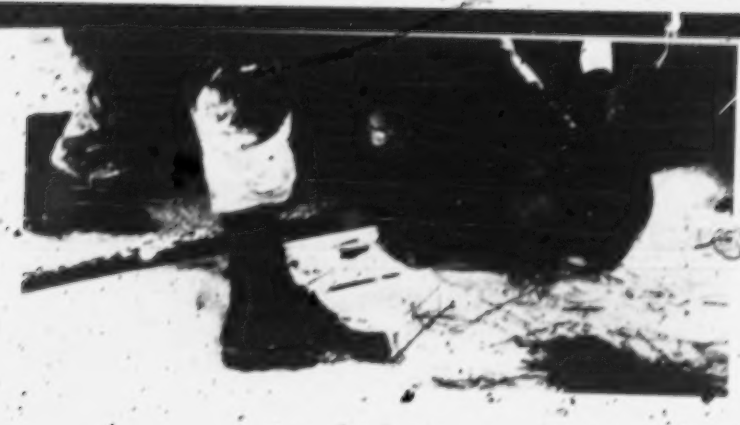
There was a strong majority for the system in the

Social Democratic Party. Also, the Communists were very much in favor of the non-violent defense system, but the Conservatives were very much opposed. The final total is 187 opposed and 196 in favor, which means that the new non-violent defense system is hereby decided upon. This means a four-month course in non-violent techniques for all citizens and one month of repetition every three years; and for the first time in Swedish history this applies to both men and women.

Various shots of demonstrations and police. A shot of the plane with the CONSERVATIVE STUDENTS *banner.*

Even at the last minute there were violent debates over the reform. Some groups among the students turned out to be unexpectedly conservative.

Shots of young men and women struggling in the snow.



ANNOUNCER (*voice over*): Last winter we visited with some new recruits and on that day's schedule it read: "Sociodrama." This was one of the first exercises for newly drafted youngsters. Their mission was to block a railway track.

A MALE VOICE: What would you do if it were your wife lying here on the tracks, you silly fool . . .

NON-VIOLENT OFFICER: Break it up! Time for self-criticism!

Get up! I shut up! You speak!

FIRST NON-VIOLENT SOLDIER: I think this whole exercise is unreal. I don't think this situation would take place—I mean, that they would come unarmed like this.

SECOND NON-VIOLENT SOLDIER: I agree.

FIRST NON-VIOLENT SOLDIER: This is too simplified a situation for us.

THIRD NON-VIOLENT SOLDIER: I mean, if the situation were critical—that is, if a train loaded with ammunition were coming this way—who cares if a few people are lying on the tracks?

HOLMSTRÖM (*approaches the group*): Am I allowed to take part in the self-criticism? Isn't it hard to restrain yourself from striking back?

FOURTH NON-VIOLENT SOLDIER: Yes, it's incredibly hard—even during exercises like this one.

HOLMSTRÖM: Is it possible through training to eliminate your aggressive feelings when maybe it's your fiancée who is being shot?

FIRST NON-VIOLENT SOLDIER: I think so.

HOLMSTRÖM: And you don't feel like a coward?

FIRST NON-VIOLENT SOLDIER: No!

HOLMSTRÖM: So after all you are gladly taking part in this?

NON-VIOLENT GIRL: Well, gladly . . .

HOLMSTRÖM: In the days of the old defense system, women didn't have to take part, but now they must. What do you think about that?

NON-VIOLENT GIRL: I'm all for it. Why should only men defend themselves? I think it's . . . I don't see why *he* should just sit there and get shot.

HOLMSTRÖM (*to the instructor*): To a spectator this looks like a scout camp, rather than a realistic war or occupation.

NON-VIOLENT OFFICER: No, I think this is just as realistic

as ordinary military exercises. Those too can remind you of scout camps or playing cowboys and Indians. I can't see any difference.

HOLMSTRÖM: Part of the idea is to make friends with the enemy soldiers as people, right?

NON-VIOLENT OFFICER: Yes, just like during World War I, when the soldiers left their respective trenches and exchanged cigarettes and made friends with each other.

A title appears on the screen.

FRATERNIZATION

HOLMSTRÖM: This means that you'll make friends . . .

SABOTAGE

. . . with the enemy. But, don't you thereby . . .

. . . open your front to their propaganda?

NON-VIOLENT OFFICER: Yes, of course, but we also make it possible for them to receive hits. And that's what's most important. We must always be open.

HOLMSTROM: Would you say that it's those with the strongest characters who can take the greatest strain?

NON-VIOLENT OFFICER: Roughly, I'd say that those who can stand the greatest strain in a conventional war can also stand the strain in this. (*A train whistle sounds.*) Now, my friends, we will change sides! Those who were the defenders down here will now be the aggressors, and vice versa. It's important that those who are the aggressors really feel the pleasure, the excitement of violence, so that you get to experience it in reality. Okay, let's begin!

CHORUS (*voice over*): "We shall . . ."

NON-VIOLENT OFFICER: Change groups! Go ahead!

CHORUS: ". . . overcome some day."

NON-VIOLENT OFFICER: Hurry up . . .

CHORUS: "We shall . . ."

NON-VIOLENT OFFICER: . . . so we don't get too stiff,

CHORUS: ". . . overcome."

NON-VIOLENT OFFICER: We're all frozen stiff . . .

CHORUS: "We shall . . ."

NON-VIOLENT OFFICER: . . . already.

CHORUS: ". . . overcome."

NON-VIOLENT OFFICER: Ready!

CHORUS: "We shall . . ."

NON-VIOLENT OFFICER: Go!

CHORUS: ". . . overcome.
We shall overcome some day."

21. Lena takes a bicycle ride

The count on The Great Scandal Board increases from 11,280 to 11,304.

Lena has left Stockholm. She rides her bicycle down a country road thinking about the possibilities of the non violent defense system and humming with great confidence.

LENA: "... deep in my heart
I do believe
we shall overcome some day."

Suddenly a car from Stockholm roars by. The road is full of puddles and the driver ruthlessly splashes water all over the girl.

Lena is furious and yells after him:

LENA: Oh, you Stockholm bastard! Go to hell! Road maniac! Damned road maniac! Go to h ... Oh shit! You big shit! (*Her cursing goes on and on.*)

22. *Lena tells the people*

In every little village or town she passes through during her ride through Sweden, Lena posts messages on trees and walls. For example:

MESSAGE TO HUMANITY:
DOWN WITH PRIVILEGED SOCIETIES!
—LENA

MESSAGE TO BLACK PEOPLE:
BE PREPARED! THE WHITES ARE STAGGERING!
—LENA

23. *The rivals*

Börje suddenly decides to visit Lena. When he arrives she is not there. Instead, he runs into a stranger in Lena's archive. The stranger is Magnus and they are both equally surprised.

MAGNUS: Hello! Who are you?
BÖRJE: Check the files! Number 24.
MAGNUS: What are you doing here?
BÖRJE: Lena was looking for me at my job one day when I wasn't there. Now I'd like to know where she is. Do you know where she is?
MAGNUS: Yes.
BÖRJE: Where?
MAGNUS: She's on a retreat.
BÖRJE: What?
MAGNUS: A retreat! Do you know what that is? A *retreat*!

Börje gets aggressive. He knocks Magnus down and grabs him by the hair.

BÖRJE: I asked where Lena was.

MAGNUS: She wants to be left alone.

BÖRJE: Yes, yes! She wanted to see me. What are you doing here?

MAGNUS: What am I doing! I live here.

BÖRJE: What?

MAGNUS: I live here. I've been told to stay here and take care of the place.

BÖRJE: Has Lena left town?

MAGNUS: I don't know! I told you she wants to be left alone. What in hell do you come barging in here for? I've told you that Lena wants to be left alone, that I live here, and that I don't know where she is.

BÖRJE: You're lying!

MAGNUS: No!

BÖRJE (*slapping him*): You're lying!

MAGNUS: No!

Lena's father has appeared in the doorway.

RUNE: Hey, what are you doing?

BÖRJE: Listen, where is Lena?

RUNE: In Småland.

BÖRJE: Where in Småland?

RUNE: At Rumskulla.

BÖRJE: Thank you.

24. Lena on a retreat

Lena has withdrawn to an isolated place in southern Sweden. She has rented an old abandoned cottage. She has an ambitious program during her retreat:

6:15 MEDITATION

In order to come closer to nature, she gets up early and meditates on a bluebell.

7:30 BREAKFAST

As an Indian steps into the healing waters of the Ganges, she wades into the Stångå and fills a bowl with fresh water for her morning meal.

9:00–12:00 MEDITATION ON LARS GYLLENSTEN'S TEN COMMANDMENTS

In response to the question "Are God's Ten Commandments Enough?" the Swedish author, Lars Gyllensten, has written a set of ten commandments for this age. The walls of Lena's house are covered with posters copied from this book. She reads:*

THIRD COMMANDMENT:
THOU SHALT REFLECT THAT COMFORT AGREES AS WELL WITH OTHER PEOPLE AS IT DOES WITH YOU.

FIRST COMMANDMENT:
THOU SHALT NOT HAVE ANY OTHER GODS THAN PROVISORY ONES.

12:45 LUNCH

For lunch Lena has three peas, which she eats carefully.

1:00 STUDIES

In honor of Martin Luther King, she has built an altar to NON-VIOLENCE*—central symbol: a broken shotgun. She reads his writings and studies the techniques of non-violence.*

2:10 FIGHT AGAINST NONSENSE

Consists of various activities; for example, burning magazines.

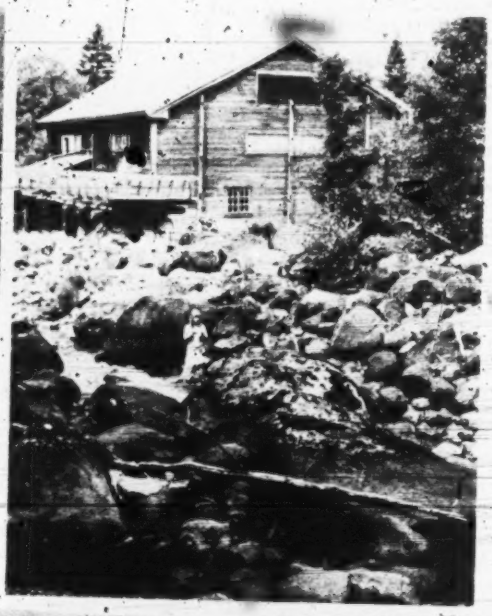
3:00–5:00 SELF-MORTIFICATION

She is making a bed of nails. She meditates over a piece of banana cream cake in order to learn to stay away from sweets.

6:30 DINNER

She savors and then noisily gobbles a whole carrot.

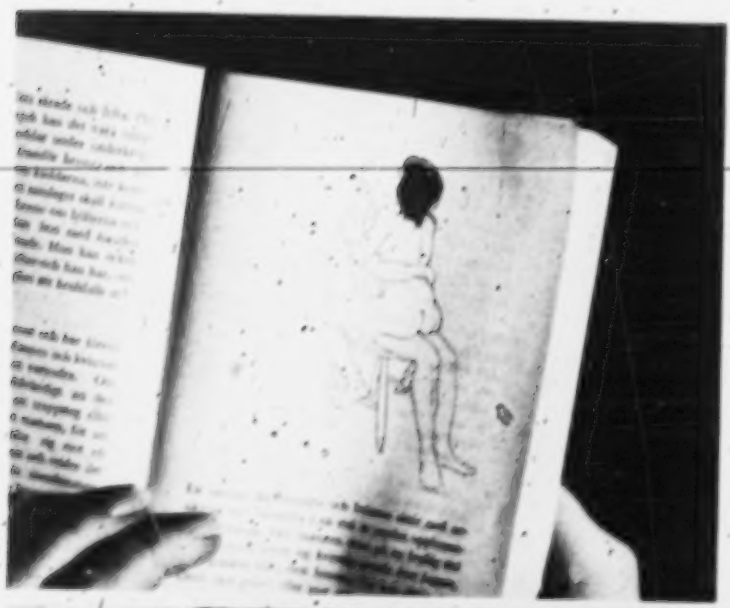
* These have been published in English in *Sweden Writes* (Stockholm: Bokforlaget, 1965).—*Trans.*



ICKE-VÅLD
MARTIN LUTHER KING OCH LEJA

10:05 SEXUAL THEORY

Upon retiring, she studies recently published sex manuals. One illustrates fresh, unusual positions, guaranteed to brighten a conventional everyday relationship. She finds this sort of meditation difficult all by herself.



9:00 A.M. DIALECT STUDY

She usually goes to get milk from two middle-aged brothers whose dialect is so peculiar that she can translate their speech only by diligent effort.

LENA: Do you ever go to church?

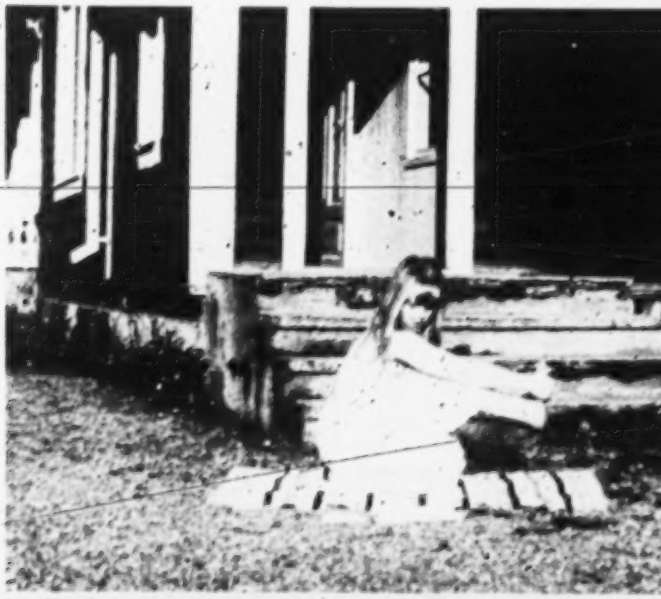
FIRST BROTHER (*in incomprehensible dialect*): No, I don't.

LENA: Why?

FIRST BROTHER (*in incomprehensible dialect*): Because they don't preach the truth, for example. They pray so beautifully for the poor, but you know very well what they're really like.

LENA: Would you like to have a woman around the house to help you?

SECOND BROTHER (*in incomprehensible dialect, grinning*): Oh, yes, of course I would, but another of my brothers used to be here and cook for us. There were always



complaints about everything. We never had time to get home and eat when he was cooking. We were always several kilometers from here when the meals were ready.

10:00–12:00 YOGA EXERCISE

On a mat in front of the house, she attempts to follow the instructions in a yoga book. But the positions are too difficult. So, in the midst of her solitude, she turns to the film crew.

LENA: No, I can't make it.

The film crew begins showing Lena positions she might try.

LENA MALMSJÖ: You needn't do that particular position. There are lots of others. This one, for example.

Lena Malmsjö, executive producer, executes a backbend. Vilgot Sjöman performs a yogi shoulder stand.

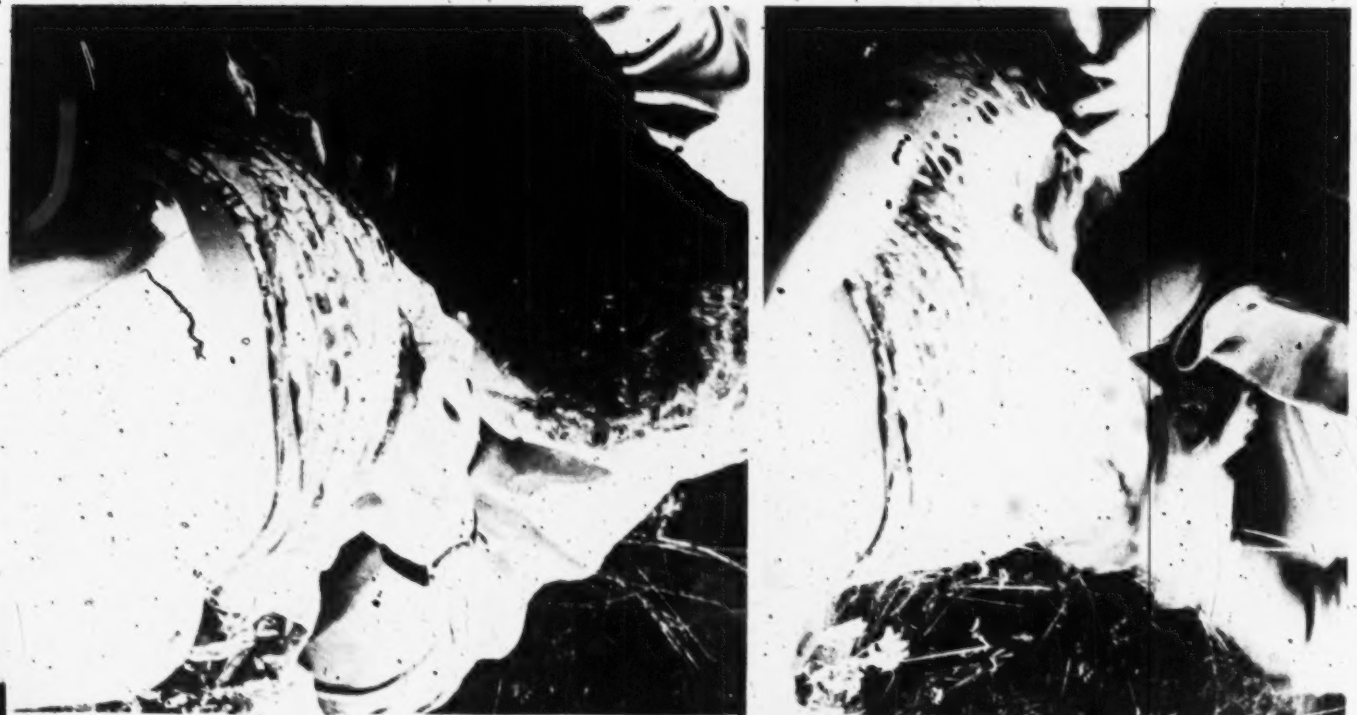
VILGOT: Nyman! Have a look! But loo . . . And then just straight up, you stretch them like this. Is that okay?

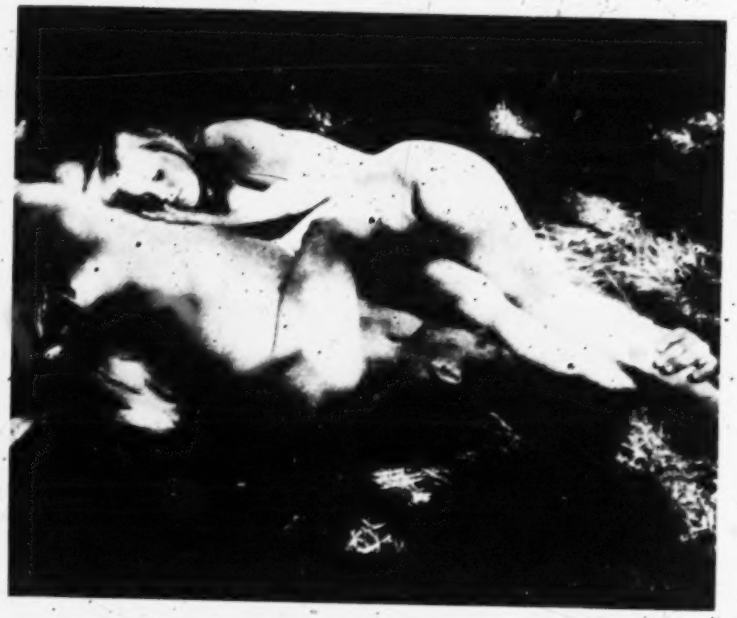
Everybody helps. Cameraman Peter Wester and his assistant Andreas Bellis; sound engineer Tage Sjöborg and his assistant Christer Östberg; script girl Marianne Johnson; general assistant Bengt Palmers, and production manager Raymond Lundberg—they all demonstrate positions for Lena. Each is identified by a subtitle.

25. Wild West in Fagerdal

Börje roars through Småland in a new white MG. He drives into Lena's yard. She grabs the shotgun from the altar to non-violence, loads it, and stalks him, as in a cowboy film.

He grabs the gun from her and dumps her in the grass. He lays his head in her lap and drinks, as if from a well.





Some time later they lie, exhausted, their bodies satisfied, sprawled in the grass. Börje caresses her side, she kisses his penis: small, light, childishly contented kisses.

BÖRJE: I had trouble finding you.
LENA: Have you done much looking?
BÖRJE: Yes, I have.
LENA: What a nice car you have.

BÖRJE: You think so?
LENA: Mmm.
BÖRJE: I've got a new job.
LENA: Mmm.
BÖRJE: I quit Ryden's.
LENA: What are you doing now?
BÖRJE: I sell cars. . . . What have you been doing all this time?

26. Sightseeing at Rumskulla

Lena shows Börje all the discoveries she has made at Rumskulla during her retreat. She shows him how people used to live in the past, in solitude, deep in the forests.

LENA: Here's the doorstep. Here they went in and out. Hulda, Alma, Oscar, Selma, Emil, Emilia, Amanda and all the children. In 1882, 1883, 1884 . . .

BÖRJE: Hey, what are these stones?

LENA: That's the stove. And this is all there was to the house.

Börje has brought a present for Lena: a small bracelet. Lena is moved and kisses him.

The director, who is watching them, gets a little disturbed and caresses the script girl.

Lena and Börje are parked on a hill with a beautiful

view. She wants to teach him Lars Gyllensten's ten commandments.

The Fourth Commandment: "Thou shalt take care of those who cannot take care of themselves."

BÖRJE: "Thou shalt take care of those who cannot take care of themselves."

LENA: The Seventh?

BÖRJE: The Seventh? What is that?

LENA: "Thou shalt, if you belong to the many who are better off than they deserve, share with others. Otherwise . . ."

BÖRJE: ". . . otherwise you are stealing." Who the hell is Gyllensten?

LENA: Lars Gyllensten is a fantastic guy.

BÖRJE: What's all this good for?

LENA: The old commandments weren't written for the

people of today. That's why he rewrote them.

BÖRJE: Mmm.

LENA: The First?

BÖRJE: "Thou shalt worship only temporary gods."

LENA: Mmm.

BÖRJE (*points*): What's that?

LENA: The school of Grönshult. With electricity and a well. Sold for 3000 kroner.

BÖRJE: That's damn cheap! Three thousand kroner.

LENA: Yes. People move to the towns. Mostly girls. They just can't live like they used to.

BÖRJE: No.

LENA: The Sixth Commandment?

BÖRJE: What's that?

LENA: "Thou shalt not spread venereal diseases, or bring unwanted children into the world, or expose other people to sexual violence. Also, you should play your part

in keeping the birthrate as low as possible, because altogether too many children are born. For the rest, you may devote yourself freely to sexual intercourse, masturbation, pornography, and such other good things of this kind as your animal nature, in its grace, may cause you to desire."

The subject makes them both horny; Börje steps on the gas and off they go, driving through the beautiful old village of Övrakulla, now crowded with wrecked cars.

BÖRJE: And so, if he sells two or three cars a month, he'll make about 1200 kronor.

LENA: Mmm.

BÖRJE: Then you have the average guy who makes about . . . (*Börje looks around.*) What's this?

LENA: Two brothers sell junk here.

BÖRJE: Well, you see, the average guy earns 700 plus . . .

Then if he sells eight or nine cars . . . No, what the hell. He won't sell more than four or five cars, the average guy, that is . . .

LENA: Mmm.

BORJE: He'll make 1800 kroner a month. Yes, it's a tough business!

LENA: Mmm.

BORJE: Then you have the top guys!

LENA: Mmm. This is a typical dying village.

BORJE: Oh yes, it is.

LENA: Pity!

BORJE: Yes.

LENA: Do they cheat too, these guys?

BORJE: Between us, I can tell you that 1964 was a top year. That year a guy could make 20,000 kroner.

LENA: Twenty thousand?

BORJE: Twenty thousand a year. *Tax free!*

LENA: *Tax free!*

BORJE: But I guess a year like that won't come again.

LENA: Look! Look at the walls!

BORJE: Oh, yes.

LENA: To think that a hundred years ago they came here . . .

BORJE: Yes.

LENA: . . . and pushed and pulled . . .

BÖRJE: Yes.

LENA: . . . and slaved . . .

BÖRJE: Yes.

LENA: . . . to build these walls.

BÖRJE: Oh yes! Then . . .

LENA: And then they all moved away.

BÖRJE: That's right! Then you have . . .

LENA: It's really abandoned!

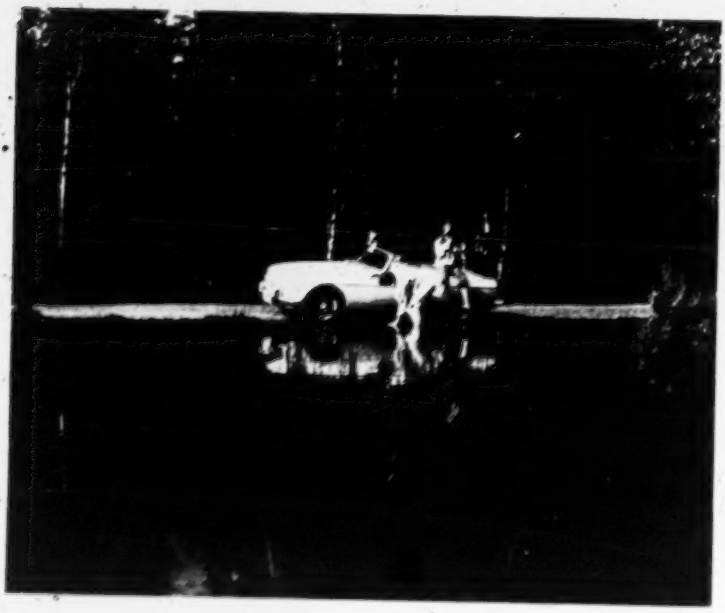
BÖRJE: Yeah!

LENA: Everything!

BÖRJE: Yes, but Lena, then you have the top salesmen! They make *45,000 a year!*

They park the car to wash it at a bend in the road where the Stångå has overflown its banks. Lena is emptying a little packet of car soap into the water.

LENA *(sings)*: "In Rio de Janeiro you can truck for free . . ."



Lena has poured the car soap into the river; Börje wets the sponge, Lena tries to open the trunk of the car. It is locked.

Can I have the key?

BÖRJE: I forgot it!

LENA: No, you didn't forget it, it's there on the key ring.

BÖRJE: I took it off and forgot it.

Lena tries on Börje's driving gloves.

LENA: How nice they are. But of course they should have been smaller and have had a big hole here.

With no apparent cause or explanation, she throws his gloves into the river. Börje is annoyed.

BÖRJE: Go and get them!

LENA: No.

BÖRJE: Get them!

LENA: No! *A-s-k M-a-r-i-e!*

With all their clothes on, they walk right out into the water. They throw the wet gloves at each other. Börje tackles Lena and both fall into the water and flail about. Börje grabs Lena.

How could you be so stupid as not to tell me about Marie?

BÖRJE: What?

LENA: You were stupid not to mention anything about Marie. If only you'd told me, it wouldn't have mattered. But going around keeping secrets like a damn . . .

BÖRJE: Like a what?

LENA: Are you going to marry her?

BÖRJE: I don't know. I don't think so. I have a child, you

know. We've talked a lot about it, Marie and I. It's a great responsibility to have a child. It's . . . I've thought a lot about it, but . . . No, I don't think I'll marry her.

They crawl into each other's arms, reconciled, and frolic in the water like a couple of otters, with only Börje's bottom showing.

They put their wet clothes on a line and drive through Rumskulla as if they'd just bought it. Singing "We shall overcome," Lena tacks one of her messages onto a tree.

MESSAGE TO HUMANITY:
I FEEL FINE NOW

—LENA

They are in the branches of an old oak tree, Rumskulla's main attraction.

LENA (*sounding like a guide*): The largest tree in Europe! Fourteen meters in circumference, 2000 years old.

Aroused by the sex education books she has been reading, Lena gets Börje's assistance in inventing an extraordinary, new (to date undiscovered and undescribed) position.

BÖRJE: What do you think?
LENA: Well, I guess it should work.
BÖRJE: Yes, I think so.
LENA: It isn't that bad, you know!

A cow appears briefly. On her forehead is a superimposed:

?

BORJE: No. Oh, hell, my thighs are aching.

A title is superimposed:

EXERCISE WITH TV

LENA: Your legs? They hurt?

They have separated. He unbuckles his belt.

BORJE: No, pain in my thighs.

LENA: Then you should feel the muscles I have! (*She removes her slacks and points to the "Musculus Protector Virgines."*) What do you think?

BORJE: What's wrong with them?

LENA: Here! Feel!

BORJE: Are they supposed to be like this?

LENA: No. It's because chicks squeeze their legs together.

BORJE (*as he simultaneously drops his trousers and shorts to his ankles*): Why?

LENA: They're not supposed to spread their legs like boys do, and that's how this muscle gets so hard. Then when they go to bed with a guy they can hardly spread their legs.

BORJE: But you don't have that problem, do you? You said you had slept with twenty-three guys.

LENA: Yes, but the first nineteen were no fun.

BORJE: Why?

LENA (*sighing*): I slept with them because they wanted to sleep with me, so that they could have orgasms. I couldn't believe that anybody could like me the way I look: with drooping breasts, big belly, fat.

In the middle of their highly confidential talk and tender embraces, they're interrupted by singing. A group of

fundamentalist Christians are having a revival meeting in the Sunday sunshine. They are singing: "He who created heaven and earth . . ."

27. Roses for Madeleine

They have returned to Lena's cottage after their sightseeing. Exhausted from lovemaking, they have fallen asleep on the floor naked. Lena awakens. Kneeling over Börje, she calls his name softly, checking to see if he is awake. Then she moves to his trousers, stealthily takes the key ring, and sneaks out to the car. She opens the trunk

and finds a bouquet of half-wilted roses. And a hair dryer. Both apparently meant for someone named Madeleine—yet another of Börje's many girls. Lena reads the card.

LENA (*imagining what Madeleine might look like*): "Madeleine's wish is Börje's command."

Which is a hair dryer. A fine, new hair dryer. Bought

at a discount! Forty per cent off.

Lena sneaks back into the house, passing the poster of Gyllensten's Fourth Commandment:

THOU SHALT TAKE CARE OF THOSE
WHO CANNOT TAKE CARE OF THEMSELVES

*She hides the hair dryer in the black bag—*THE GUILTY

CONSCIENCE OF SOCIAL DEMOCRACY—*the contents of which the audience has been invited to guess.*

Titles appear on the screen as a reminder to the audience of the promises of the contest:

THE CABANA IN SPAIN
THE LUXURY CRUISE!
THE WINNER MIGHT BE
YOU

Börje lies half-awake on the floor. He calls for Lena. She enters silently, goes to Börje, crawls in front of him, her back to him. He pulls her to him, forces his way into her. She offers no resistance. Closed eyes. Violent movements. In the midst of their actions, she calls out questions as if conducting a public-opinion poll.

LENA: Does Madeleine have dark or blond hair?

BÖRJE: Dark.
LENA: Which social class?
BÖRJE: Upper.
LENA: Fat or thin? (*She sticks her thumb in her mouth.*)
BÖRJE: Very thin.
LENA: The model type?
BÖRJE: Better than that.
LENA: Single?

BÖRJE: Engaged. But she's going to break it off.
LENA: Because of you?
BÖRJE: Yes.
LENA: Did you know her before you met me?
BÖRJE: Yes.
LENA: Does she have better orgasms than I do?
BÖRJE: I don't know.
LENA: Haven't you slept with her?
BÖRJE: No, not yet.

Lena stops her questions for a while as they continue moving violently.

LENA (*screaming*): Why the hell haven't you done that?

BÖRJE: What?

LENA: Slept with her, of course! Why the hell haven't you slept with her?

She pulls away. Börje starts to get up. Seated facing each other, they continue.

BÖRJE (*shouting*): Damn your curiosity! You're always tearing everything into bits and pieces. Into talk and interviews!

LENA: Yes, and you're always keeping your mouth shut about everything! You told me nothing about Madeleine and nothing about Marie!

BÖRJE: You can easily put Marie or Madeleine in your files as well. Go ahead!

LENA: I don't want that upper class bitch.

BÖRJE: No, instead you want this kind of crap, don't you? (*He seizes the teddy bear she always takes with her and hurls it into the next room.*)

LENA: Keep your fucking hands off my doll, you pig.

She rushes into the next room, slamming the door behind her. She picks up her teddy bear, and runs, crying, to a corner of the room. Börje comes after her and picks up one of the books she had placed in a neat square around her typewriter.

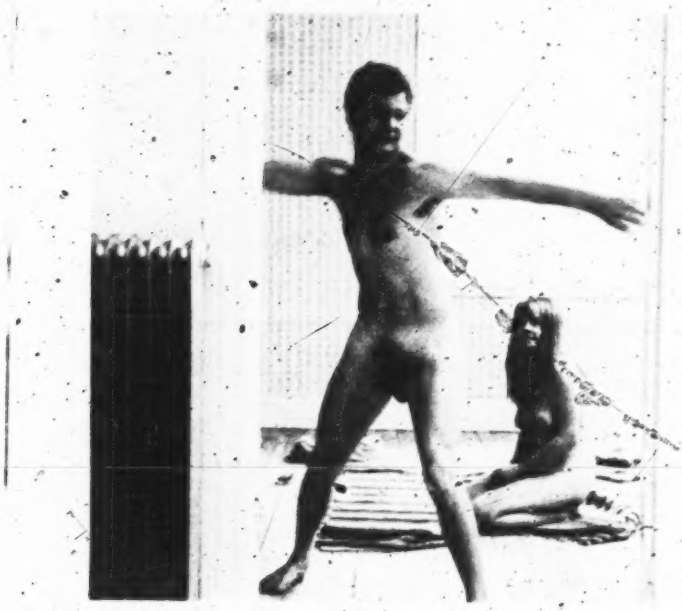
BÖRJE: May I borrow this from you? May I borrow *The Passive Female Ideal*?

They struggle.

LENA: Yes, that's what you need. That's just what you have, a passive female ideal!

BÖRJE: What did you say I had?

LENA: A passive female ideal! Let go of me!



VÄR HYGGLIG MEN INTE FLAT
HAR DU SVÅRT ATT VALJA
SÅ VAR HELLRE FLAT ÄN
STYGG.

GÄSTBOKEN 2:a BUDGET

Lena dashes into the next room, Börje in pursuit. He grabs her by the elbows.

The film crew waits outside the house. Everyone tries to mind his own business, ignoring the unpleasantness within.

BÖRJE (*from inside*): Come here! Have a look!

LENA (*from inside*): That damn hair dryer! And the roses!

A door slams. Vilgot goes up to Raymond, the production manager, and asks him to close the outside door so that the racket cannot be heard.

Inside the house. Their screaming and struggling continues.

BÖRJE: Have a look around. Admit the fact that you're screwing around with things that are over your head.

It's all beyond you!

LENA: You lousy salesman!

BÖRJE: You've just got a big mess inside your head. Why don't you try doing something—like dicting? Why don't you put caloric charts on your walls instead of this stuff! And listen, you think you can ride in my MG with those drooping tits!?

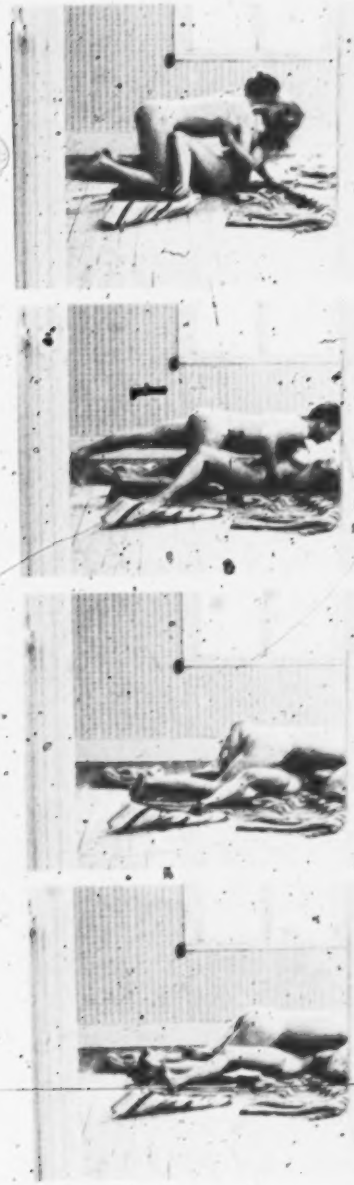
LENA: You lousy salesman!!

She gives him a violent shove, knocking him over, and runs into the next room.

Börje gets up and runs after her. He grabs her, and they fall to the floor.

BÖRJE: "Börje's joy . . ." I'll give you a taste of "Börje's joy . . ."

She is sobbing as she lets him take her.

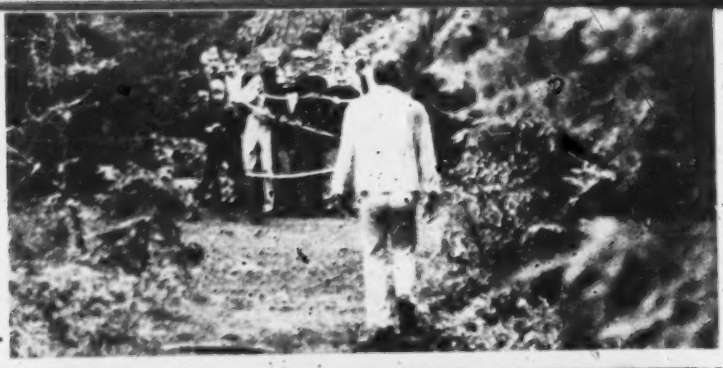


The sound of the car engine awakens her. She goes to the front door exhausted, only to watch Börje disappear in a cloud of dust. She stands for a time at the door, crying.

LENA (*voice over*): I didn't get much sleep the last night at Fagerdal. I was itching all over and everything was screaming in my brain. I remember one of the dreams:

how the Rumskulla football team came running through the woods. I got hold of them, both the varsity and the second string. But one of them was missing. There were only twenty-three.

Lena is tying the twenty-three boys with thick rope to another giant tree when the twenty-fourth comes through the woods. It is Börje. Lena grabs her rifle and shoots him down.



She goes to him, turns his dead body over, takes out her knife and castrates him.

28. Lena's crisis

Lena's retreat is over. She leaves Småland. As she cycles back to Stockholm, several drivers offer her lifts. She rebuffs them with disgust.

Then she hears a fatherly voice calling to her.

VOICE: Lena! Lena! Lena! I want to talk to you. It's me; Martin Luther King.

She turns a deaf ear, but the voice continues. Finally she stops.

LENA: Listen, Martin! I'm terribly sorry that I just can't make it when it really matters, but that's the way it is. (*In despair.*) He's a big shit, that Börje! A big fucking shit and I'll *kill* him when I get hold of him. I'll cut off his cock!

Martin Luther King gazes at her with insight and compassion. This is more than she can take. She closes her eyes; her lips begin to tremble.

You've said it yourself, haven't you? If you can't live by the principles of non-violence, you shouldn't be in on it! You've got to have people who are strong. (*Like a child.*) I'm never going to speak for your ideas any more!

She is close to tears. She tries to comfort herself by going into a coffee shop. She breaks all the rules of her diet, stuffing herself on cake after cake.

Suddenly, a voice is heard from the shop's TV set.

BO HOLMSTRÖM: The long anticipated proclamation of the renewal of the Swedish defense system was issued at today's cabinet meeting.

The proclamation, which will be sent to all foreign countries, reads as follows: "The Swedish government hereby declares to the world that in case of enemy occupation of Swedish territory, resistance will be undertaken with any means except violence.

"The thorough instruction in non-violent techniques which all Swedish citizens, both men and women, have received over a long period of time enables us to carry out this method of defense certain that Sweden is uniquely equipped to meet any enemy attack."

Lena begins to cry uncontrollably. When she stops, there is a sense of relief. The idea continues, even if she has abandoned it. The idea is greater that she is.

The count on The Great Scandal Board increases from 11,328 to 11,330.

Lena cycles slowly into Stockholm.

29. An A-bomb for Sweden

A collection is being taken outside the Parliament building. A Swedish military officer is protesting official policy by standing with a collection box under a poster which reads:

GIVE YOUR SUPPORT TO A SWEDISH A-BOMB

He explains his viewpoint to people who stop.

OFFICER: As you know, Sweden is the only neutral country in Scandinavia, and to maintain our neutrality we consider it essential to have a deterrent weapon.

A MAN: Yes, but then all the other countries would start too. All Scandinavia would have bombs, and then, when the risk is that great, well, I mean, that could mean starting a war . . .

Lena cycles past.

Two Provos arrive. They are contemptuous.

FIRST PROVO: We'll give you a peace-button for support.

SECOND PROVO: A "Ban the Bomb" button.

FIRST PROVO: Here, move over so I can . . .

SECOND PROVO: Well, then, we've both put one in as a gift . . .

OFFICER: Thank you.

FIRST PROVO: . . . as a counter-demonstration to this terrible sign.

A third Provo appears and a Swedish worker sees the sign and stops.

WORKER (angrily): That's the worst goddam thing I've ever seen. Tear the sign down, you guys! What the hell, we're not going to have any atom bombs here, damn it all!

FIRST PROVO: To dare to present opinions like these, publicly! And in front of the Royal Palace, on top of

all. Incredible!

he worker walks off, gesturing contemptuously.
hree nice little ladies who are very much in favor
he bomb open their purses as they look at the sign.

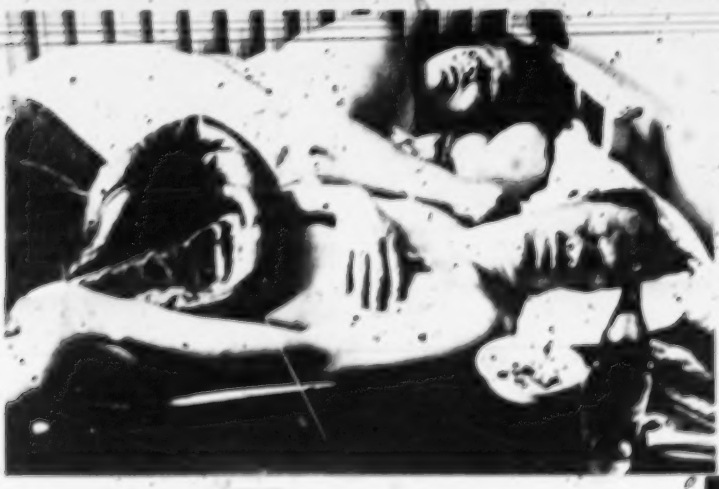
CER: Well, we're polling Swedish public opinion.
: Oh yes, I understand. Some sort of psychological
st . . . (*She puts her contribution in the collection*
x.)
CER: Thank you.

30. Lena returns home

Lena has arrived home and is parking her bicycle in the backyard. As she is sticking a letter back on THE GUILTY CONSCIENCE OF SOCIAL DEMOCRACY *bag, a voice is heard reminding the audience of the big contest.*

SPEAKER: Oh, take it easy, Lena. It hurts. But where does it hurt the most? It's your opinion that we want. Yes, just yours! You who want a week of gymnastics with Princess Birgitta, your own cabana in Spain, or any of our innumerable consolation prizes. Nobody will leave our contest unrewarded, nobody who can guess what Lena found in the THE GUILTY CONSCIENCE OF SOCIAL DEMOC . . .

The speaker stops as Lena opens the door to Nyman's Institute and enters the kitchen. There on this bright



Sunday morning her father lies snoring. He is sleeping off a drunk. Beside him lies Chris, a big fat woman whom Lena hates.

Lena goes into her archive only to find that this has been invaded. There, lying on the floor, are a couple of her father's drinking buddies. Stricken, she leans against the fireplace and recalls how she used to attack the Great Injustice: "Some people were born with very little talent. They are lost, sort of butterfingered and brainless. . . ."

And now they're lying there, in her own archive, sleeping like little children. It reminds her of what Olof Palme said in his talk with Vilgot.

OLOF PALME: That's one thing: it is worse in most other places. But all societies have been tormented by the tendency to label people according to family, money, and social position. And we have this tendency here too.

VILGOT: But there is an impression in other countries, I think, of great equality here, that we're far ahead in this area. What do you think?

OLOF PALME: Well, it's true that a lot of work has been done in that direction—partly on wages, and so on, but mostly we have worked on developing the possibilities for individuals. That's one thing: this enables us to know what direction to take in the future. But the other thing is that it's an illusion to believe that the trend toward equality has gone as far as some of the kinder critics of welfare states like to think.

31. British Motor Company

A foreign car showroom. Börje is dusting one of the cars on exhibit. He scratches at his fingers. Through the window, he sees Lena approaching. It is nearly closing time. Börje's boss comes out from his office onto the mezzanine.

BÖRJE'S BOSS: Börje! You sold the car to Mr. Johnson, I remember perfectly. Now he's on the phone and he's damned angry. I told you when you started selling cars that you can't just promise people the moon. You told him he'd get a radio and fog lights. You promised him practically everything you can put on a car, damn it. You can't do that. This is your last chance, next time you're fired. I'm so mad I could throw you out on the spot. This is incredible. It's not . . .

Börje scratches his neck. He can't think of a reply.

Then Lena strolls in carrying Madeleine's hair dryer.

LENA: Hello!

BÖRJE: Hello!

She hands him the hair dryer.

LENA: Can we go and talk somewhere?

BÖRJE: Yes, well I'm off now anyway. I could drive you some place. Shall we go down to the garage?

When they arrive at the garage, Lena helps Börje fold down the top of a white MG, a demonstration car. He tries to take her in his arms.

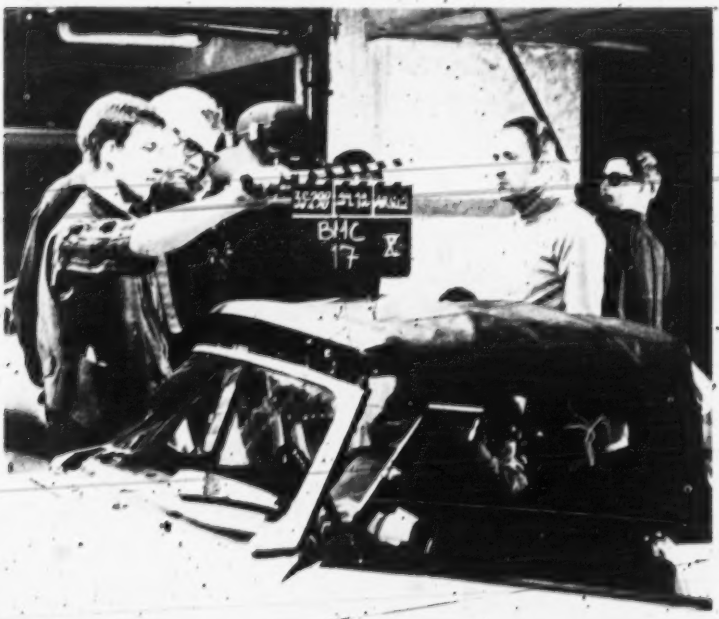
LENA: No! Have you been to bed with Madeleine yet? You have made some progress, haven't you? Of course it would be better if you hadn't, because I've got a case of scabies.

BÖRJE (*draws back*): So that's what I've got!

They don't get any further in this revenge scene, as Vilgot interrupts the shooting.

VILGOT: Cut! "From you" you were supposed to say. Didn't we agree to that? We're going to take it again!

A member of the crew absently begins singing: "I like the touch of fame, I like my own sweet name . . ." but is soon hushed. "Don't sing that just now. Vilgot shouldn't



hear that." Looking hurt, the director watches the couple quietly talking to each other. They have obviously been intimate off camera, behind his back.

VILGOT (*voice over*): The damn girl is using me. She's using me like everybody else. This movie is her big break and she knows it, and God, does she ever take advantage of it! And along the way she takes Börje too. A toast to the Crown Prince! Skål! He doesn't really care about her, he just wants to compete with me.

Vilgot calls for quiet. They retake the scene. Again the director stops the shooting.

VILGOT: Well, excuse me a second. Lena, the glasses.

BÖRJE: What about them?

VILGOT: You should take them off when you begin talking . . .

BÖRJE: But she was supposed to wear the glasses during . . .

VILGOT: Yes, but listen, she wears the glasses at first and *then* she takes them off . . .

BÖRJE: What the hell, can't you make up your mind?

LENA: You changed your mind.

BÖRJE (*pointing to the script girl*): Ask Marianne.

VILGOT: I never changed that!

BÖRJE (*calling*): Marianne!

VILGOT: I said that from the start!

BÖRJE (*calling*): Marianne!

MARIANNE: Well, it *was* decided that she'd wear them.

BÖRJE: She should, yes.

MARIANNE (*to Vilgot*): Yes, Börje is right.

BÖRJE: See, I'm right.

VILGOT: No, no, you haven't understood a thing. She's supposed to wear them at first and then . . .

BÖRJE: Fourth take with, fifth take without, sixth with. Make up your mind, damn it!

Another take?

VILGOT: Yes, that's right, another take.

BÖRJE (*hostile*): Another take, huh?

VILGOT: Well, that's what we're here for.

BÖRJE: Yes, but make up your mind, tell us what to do. I'm listening. Lena and I are both listening!

VILGOT (*sarcastic*): That's fine. The Crown Prince is listening—until we're ready to shoot.

LENA: So I take them off?

VILGOT: Well, you start by having them on, you start by

talking about Madeleine, and then when you talk about the scabies you look into his eyes, see?

LENA (*sullenly*): Mmm.

VILGOT: And by then you've taken them off.

LENA: Mmm.

VILGOT: Is that all right?

LENA: Yes.

BÖRJE: Without glasses then?

Vilgot gives up. Those damned actors gamble everything. Borje's boss and another B.M.C. salesman are standing in a corner, whispering. Vilgot walks over to them.

VILGOT: They're so scatterbrained, we're getting nowhere today.

BORJE'S BOSS: No, you can see that.

VILGOT (*a bit miffed*): What can you see?

BORJE'S BOSS: Well, this atmosphere is really shocking. How can you work under conditions like these?

Lena and Borge are whispering in the car. Lena is timid. Borje prods her.

BORJE: Have you talked to him?

LENA: No!

BORJE: Aren't you going to?

LENA: Yes.

BORJE: What?

LENA: Yes. Well, if he's going to be this way I might as well say it.

BORJE: Mmm. I think so.

LENA: Things can't get any worse!

BORJE: No!

Someone in the film crew begins whistling "The Internationale."

32. Lena runs amuck

The number 11,330 appears on The Great Scandal Board.

The same evening. Lena's father sits in his kitchen with his feet in a basin. Chris, the plump maternal female, fills it with hot water.

RUNE: Good!

CHRIS: Feel it now?

RUNE: Yes. A little more.

CHRIS: Little more. That's it!

RUNE: Mmm.

CHRIS: All right now?

RUNE: Mmm.

CHRIS: Good.

RUNE: Hey!

CHRIS: Mmm.

RUNE: He got his real gold frame.

CHRIS: Mmm.

RUNE: And you know how much it cost?

CHRIS: No.

RUNE: Two hundred and eighty kroner.

CHRIS: Oh, my goodness!

RUNE: Yes, and what's he going to do with it? Just sit there and point to it and say . . .

CHRIS: Hey!

RUNE: . . . to his guests . . . huh?

CHRIS: Wash your feet too!

RUNE: Yes, yes! Then he can tell his guests: "This frame cost two hundred and eighty kroner."

CHRIS: Well, so what? It's nice with a wide gold frame, and besides it's worth a lot.

RUNE: Yes, but listen! Do you think I've worked down there for half my life without knowing what art is worth? You know, the picture should be the important

thing and the frame should be less . . .

The door suddenly opens. Lena comes in.

What the hell!

Without a word, Lena goes straight to her archive. Her father and Chris look dumbfounded.

CHRIS: Has she come home? When did she get back?

Lena begins to empty her archive. She angrily brings out a carton and places it by the kitchen door. Chris gets angry too. She pours coffee.

Can't you at least say hello? That's the least one could ask.

Lena brings out another carton.

LENA (*accusingly*): Where's the collection of clippings on

Southeast Asia? I can't find it in there!

RUNE: Collection of . . . (*Rising.*) Hey, listen! Where the hell have you been all summer?

CHRIS: Nobody even dares stick his nose into your room with all the crap you have in there.

LENA: Oh, is that so?

CHRIS: That's right!

RUNE (*angrily*): Well, you should stay home and not run around on the roads and do . . . God knows what!

CHRIS: At least you could have sent a card to your father so that he'd know where you were. Don't you realize he's been worried?

LENA: He never has before.

Rune crosses to the sink and prepares to piss.

RUNE: And I've got to feel embarrassed in front of my friends at work because I don't know where my own daughter is.

LENA: That's none of their business.

RUNE: And Börje, he's been here looking for you.

The sound of Rune pissing. Chris pours another cup of coffee. Lena stalks into her room. Rune and Chris appear in the doorway.

Hey, are you going to leave home?

LENA: Home! You call this a home?

RUNE: Haven't I slept here in the kitchen? Haven't I done everything I could for you?

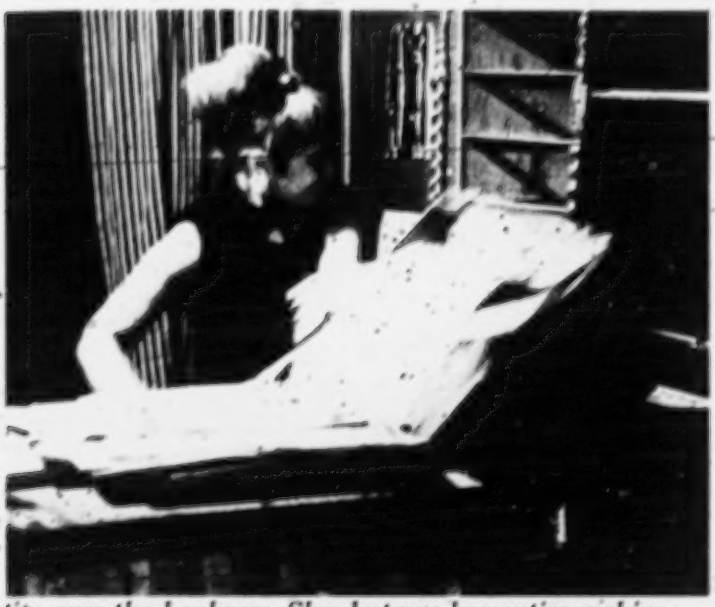
LENA: That's just your guilty conscience.

RUNE: Haven't you got the whole room to yourself? Haven't you?!

LENA (*in a fury*): That's just your guilty conscience! Do you remember at school? Remember that last day of school when you were there? That first and last time. God, was I ever ashamed! God, was I ashamed of you!

Do you think I could ever bring anybody home?! To this? You're crazy. You've done one good thing in your life. Do you know what that was? That's when you went to Spain. But why didn't you stay there? Why did you run home so quickly? Like a damned rat!

She slams the door, locks it, looks about, stops a second, and makes her decision. She pulls down the shelves, rips down the war photographs, throws down the books, and



tips over the bookcase. She destroys her entire archive.

CHRIS: What on/earth is she doing?

She begins throwing empty beer bottles at the portrait of Franco. One hits and breaks the glass. The laurel wreath falls down. She takes two knives from the closet, raises them in measured ritual gestures, kissing them. Then she thrusts them one after the other into Franco's eyes.

33. The cleansing bath

Saint George Hospital. The old bath house. The bath master is scrubbing Börje in a tub; a woman takes care of Lena.

BATH MASTER: Has it been itching a lot?
BÖRJE: What?
BATH MASTER: Has it been itching?

After the bath, their entire bodies, except for their heads, are painted with a DDT solution. They must wait twenty-four hours before washing it off. Then they are free from scabies.

The men's and women's sections are side by side. The film crew shoots them from a next-door room. Peter Wester, the head cameraman, checks the light while general assistant Bengt Palmers strums his guitar, looking for a tune.

BENGT PALMERS (*sings*):

"Lena, she stands in the tiled room,
she scratches her . . .
Yes, little friend, freedom is a hard thing.
Freedom is hard.
It tickled and itched between your legs
and now you're standing here
at the clinic at seven in the morning."

Lena stands naked. Börje stands naked. Vilgot leers at them. He seems satisfied as if he has his revenge by filming them in this situation. But he is content to turn to one of the women in the crew, Lena Malmsjö; he massages her shoulders.

BATH MASTER: Rub around . . .
BÖRJE: What?
BATH MASTER: Rub it into the pubic hairs!

BENGT PALMERS (*sings*): "DDT stings and itches."

Lena and Börje leave the bath house. Outside the hospital they stop for a second.

BÖRJE: Can I take you somewhere?
LENA: No, I'm not going in your direction.
BÖRJE: Where are you going?
LENA: None of your business.

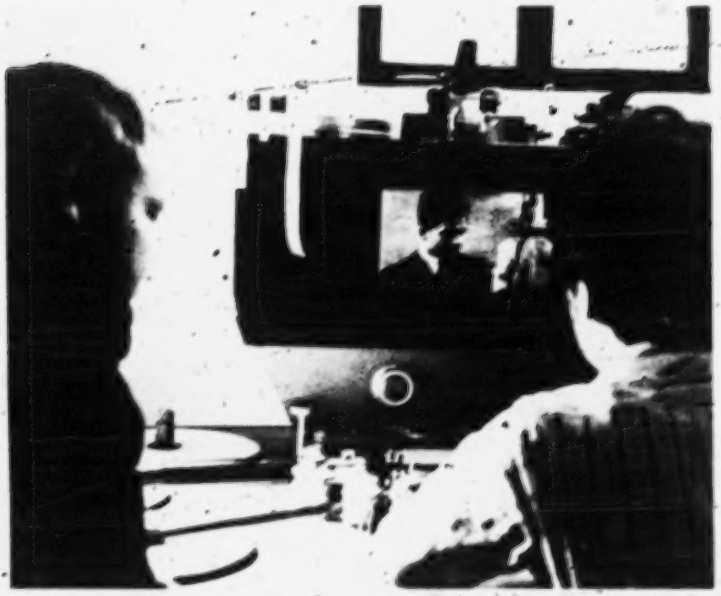
Bye-bye!
BÖRJE: Good-bye.

So ends the story of the car salesman and the girl with the archive. Each goes his own way.

34. At Sandrews

However, the story of the drama student and her film director ends differently.

A voice echoes through a loudspeaker down the corridors at Sandrews: "Olle Jacobson to the new sound stage . . ." "Bengt Ernryd to the music studio . . ." Director Vilgot Sjöman sits in the cutting room with MARIA SCHERER, DRAMA STUDENT, AGE 23.



He is running the rushes from the hospital for her, back and forth, and she is childishly delighted when he runs it at double speed making Lena and Börje sound like Donald Duck.

Lena Nyman comes down the corridor. Suddenly she stops. She has an unexpected attack of jealousy when she overhears Vilgot talking with a girl who seems to have the leading part in his next movie.

VILGOT: But, you see, you can't do anything in this country. It's just like a duck pond, everything stands still. It's just quack, quack, quack all the way.

MARIA SCHERER: No, no. Every Swede who goes to vote is full of ideas, but they never get a real chance to express . . .

His hand is on her shoulder.

VILGOT: Hey!

MARIA SCHERER: Yes?

VILGOT: You're cute when you get excited like that!

Maria smiles. Lena comes into the cutting room. Vilgot looks up. Maria Scherer looks inquiringly at her.

LENA: Hi!

VILGOT: You don't know each other, do you?

MARIA SCHERER: No. (*She introduces herself.*) Scherer.

LENA: Lena.
MARIA: What?
LENA: *Le-na!*
MARIA: Oh.

Lena hands Vilgot a key. It's the key to his apartment. She doesn't need it now that she doesn't live there any more. Vilgot takes it.

VILGOT (*tartly*): And the front-door key?

Lena has forgotten it.

Well, you can put it in an envelope and send it.

Outside, in the hall, Börje Ahlstedt, the actor, is waiting for Lena Nyman, the young drama student. In the elevator, they embrace, happy and free.

BÖRJE: What did he say? Was he difficult?

LENA (*takes a deep breath*): No. But God how glad I am that it's over!

35. *Slogans*

As the new lovers descend kissing in the elevator, the credits appear and slogans are heard again.

MALE VOICE: Buy our film! Buy it! The only film that comes in two editions. One is yellow and one is blue!

FEMALE VOICE: Buy the yellow! Buy the blue! Buy our film for there are two!

MALE VOICE: Exactly the same movie, yet each so different.

VOICES (*repeat*): This was the yellow edition. This was the yellow edition, etc.

The last image is a button with the slogan "Make love, not war" in English and the non-violent resistance emblem:

Director	Vilgot Sjöman
Cameraman	Peter Wester
Assistant	Andreas Bellis
Sound	Tage Sjöborg
Assistant	Christer Östberg
Editor	Wic Kjellin
Assistant	Wiveka Nordström
Script Girl	Marianne Johnson
Executive Producer	Lena Malmsjö
Production Manager	Raymond Lundberg
Assistants	Bengt Palmers
	Rudolf Adolfsson
Producer	Göran Lindgren

CAST:
LENA NYMAN
PETER LINDGREN (*Rune*)
BÖRJE AHLSTEDT
Magnus Nilsson
Chris Wahlström
Marie Göranzon
Ulla Lyttkens
Holger Löwenadler (*The King*)

Shooting took place in the summer of 1966, and in December/January 1966–67.
The Stockholm première took place on October 9, 1967.

Excerpts from the transcript of the trial

I Am Curious—Yellow, the film now playing in theaters in Sweden and Denmark, has run into serious censorship trouble in the United States, where U.S. Customs seized a print its distributor, Grove Press, attempted to bring into the country. Starring Lena Nyman, Börje Ahlstedt, and Peter Lindgren, *I Am Curious—Yellow* was approved unanimously by Swedish censors for showing without any cuts to anyone except children under the age of fifteen. One of the censors, Roland Haeggbom, called it "profoundly moral" and "very significant." Wherever the film has been shown in Europe, critics have acclaimed it as an important work of art with unusual relevance to contemporary issues and the social, political, and sexual problems faced by the young.

On May 20, 1968, before Federal Judge Thomas F. Murphy, a jury of seven men and five women convened in the U.S. District Court, Southern District of New York, to decide whether the adult public of the United States is to be denied a film which Scandinavian film audiences have flocked to see without any visible harm to the morals of their respective countries. For four days, the jury listened to a parade of witnesses testify to the social, political, artistic, and moral value of *I Am Curious—Yellow*. The witnesses appearing on behalf of the film included novelist Norman Mailer; Stanley Kauffmann, film critic of *The New Republic* and chairman of the National Society of Film Critics; Paul D. Zimmerman, film critic for *Newsweek*; John Simon, film critic for *The New Leader*; Hollis Alpert, film critic for the *Saturday Review*; the Rev. Dr. Howard Moody, Senior Minister of the Judson Memorial Church in New York City; Dr. Charles Winick, professor

of sociology at the City College of New York; psychiatrists Dr. Edward J. Hornick and Dr. Thomas Levin; Ned Polsky, associate professor of sociology at the State University of New York in Stony Brook; and the director of the film, Vilgot Sjöman himself.

The Government, prosecuting the film on the charge of obscenity, presented only one witness, the Rev. Dr. Dan M. Potter, a clergyman in the forefront of numerous censorship drives. The jury, after deliberating for two hours, upheld the U.S. Customs ban and found the film to be obscene. The decision is currently being appealed.

The attorneys for the Government were Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Lawrence W. Schilling, Assistant United States Attorney. The attorneys for Grove Press were Richard T. Gallen and Edward De Grazia.

One of the first witnesses was Stanley Kauffmann, who was examined by Mr. De Grazia.

Q. Would you state for the jury, please, some of the ways in which this film explores important issues of today?

A. I would begin by stating its basic tone, temper, or theme is the idea of transition, that the picture has grappled basically with the idea that we are living in a time of profound change in all aspects and perspectives of modern industrial civilization; and this basic theme of change, of transition, which is affecting all our lives, willy or nilly, is explored in four or five different veins.

That is, we see change in social attitudes, change in political attitudes, change in that version of political attitudes that deals with military views, changes in sexual relations, changes in the status of women in the society. . . .

Q. I wonder if you would please describe briefly and say a few words about each of the four or five themes of im-

portance which you have isolated in this film.

A. Well, socially, we are dealing here with the emergence of the working class into what it hopes will be a classless society. The girl was the daughter of a working man, with some education, who is shown to us to be emerging from the formerly constricted and confined status of mind of a working-class girl that her mother's and father's friends are in, into a highly educated, inquiring state of mind. . . .

Politically, she is an activist, a radical. Insofar as her identities are formulated, she is very much in favor of radical political change. She is concerned about the political drift of her country; [of] the United States; equally concerned with disappointments in Russia, and it is made quite clear in the film.

Sexually, she refuses to accept any of the conventional bars that would have pertained, let us say, to her parents. She does this without, however, sacrificing, as is shown in the film, sacrificing any of her humanity or any of her consideration for herself as a person or of other people as persons.

In fact, the main inner personal conflict of the film is because she has been disregarded as a person by the man with whom she is having an affair in the course of the picture, because he has derogated her person by telling her a lie or by not telling her the complete truth about his situation.

The military theme I mentioned is perfectly clear. She wants Sweden to adopt a non-violent frame of mind toward future embroilments, and the director shows us a hypothetical kind of dream-wish-made-true of Sweden formally adopting such a non-violent program. We see a thing over television that we know is kind of a fabricated one. It is a wish non-fulfillment.

Psychologically, the film does its exploration in carrying forward at the same time several different strands of unassailable reality and of variations on that reality that play back and forth, that present a nicely variegated, thick texture of fact and sort of fantasies on fact, which is representative of what our society is beginning to be more and more aware of in terms of our daily perceptions of what we see, that there is a great difference between the black and white that has been formerly assumed of what is fact and what is fantasy. . . .

. . . In terms of some of the possible confusion that might arise in one viewing of the film, there is the basic technique that is used through the film of the director himself being in the film, and I understand that that is the director himself who plays the director in the film, and that the actress who plays the heroine is shown to be an intimate of the director, and that this parallel relationship between the director of the film and his friends runs alongside the relationship of the character she is playing in the film and the man she encounters in that regard. And this parallelism results in some confusion, which is only a confusion if you want things to be black and white.

Or another way of putting that is that what this director is aiming at is exactly that slight fuzziness, slight blurring of the line between what is fact and what is fiction.

It is part of a modern view of not just art but a lot of matters. What used to be thought of as a clear dividing line, an iron barrier between art and life, should go or can go or has gone, and we are not really aware of it yet.

And this film is an attempt to work in that field—to, in a sense, seduce us into believing in the reality of the fiction, then snapping us out of it into another reality outside of the frame of the picture. For example, in order to make us *stop and think:* "Well, what is real? What really

is real?" For example, take the scene between the young man and the young woman in the car toward the end of the film. We have gone along with them in their relationship in the country and elsewhere, and we are pretty well absorbed in that relationship.

There they are in a car in a garage after she has gone to his automobile showroom and gone down into the neighboring garage with him. There we are with them involved in their story. All of a sudden, the director steps into the picture. The director of the film steps into the picture and tells them they are doing it wrong; they must do it over.

Now that, which is an unconventional thing to do in terms of our usual film-going experience, is a quite deliberate jar—shock—on his part, on the director's part, to bring us to with a start and say, "Well now, what is real?" We have been believing this scene between that man and that woman in the car, and all of a sudden he reminds us that that is a fictitious scene, and now we know that this is a fictitious scene, because this was rehearsed, that the director himself was going to step in, and he is trying to show us, I think, that what we have taken as absolutely fixed, concrete definitions of what is real in our minds have to be re-examined, that life is in truth a series of realities combined with unrealities.

And this film is particularly able to treat this question of what is real and what is unreal, for the obvious reason that the facility of shifting in and out, from one place to another, from one group to another and with real people, not like a novel, which leaves the reality of the people to your imagination. This device that he has used in this film is not original or unique. It has been used in a number of films in recent years—in the last three or four years at least—but it shows a growing interest, particularly on the part of younger directors, *in this* psychological question—philosophical question, really—of what we perceive, how

we perceive it, and how do we know that it is really there. . . .

Q. Would you please give us your opinion concerning the interrelationships of the political and moral themes of this motion picture and the sexual scenes there?

A. Yes. I think the sexual behavior of the girl, as shown in this film, is perfectly consonant with her other states of mind as shown in this film. That is, it would be inconceivable to me that this girl would have the sexual standards of her mother or her grandmother, any more than she has their political standards, or any more than she accepts their social status as the man's slave—or "slave." That is one part of the sexual matters presented.

In other words, her behavior rings perfectly true. Her sexual behavior rings perfectly true to me for the character as shown.

There is another part of it, which is the showing of her sexual behavior in the film, and that to me rings equally true on a different plane, that is, a director, a film maker, was going to show the daring that this girl—showed the girl's daring in political and social and other matters. It seems to me he has to be equally consistent and bow no more to convention on the sexual scale than he does on any other, either of cinematic technique or political-social approach.

In cross-examination, Mr. Kauffmann was asked whether he held to the opinion that the director deliberately intended to break sexual taboos in making the film.

. . . I certainly do think that he was out to be as frank and permissive and radical in the sexual sphere as he was in every other sphere, so in that sense I certainly think he was out further, let us say, to widen the breach that had been made in sexual permissiveness in our time, yes.

Q. Is it your testimony, Mr. Kauffmann, then, that there

was an equal break with taboos in film-making in other areas in this film?

A. I think that the treatment of certain political subjects in this film is—It is very difficult to draw any kind of common scale in these matters, but it is certainly attended with the same frankness, the same wholeheartedness, the same modernity as he has treated sexual matters, yes. There is no sort of ruler or tape measure that can be applied to politics and to sexual matters, but, to put it this way, quite subjectively, the same mind, the same point of view, the same person made the sexual scenes as made the political scenes. That is quite clear.

The next witness was film critic Paul D. Zimmerman, of Newsweek, who was examined by Mr. Gallen.

Q. Would you please state whether you found this film to present ideas or themes of social importance?

A. Yes; a number of them.

Q. Would you please state what they are?

A. Well, what I thought was most valuable about the film coming into this country, as our own film industry does not look at the New Left, at the young New Left, which, whether you are for them or against them, is a very real element in our society; and this film, along with others at this time from abroad, looks at radical students, and the main, principal, subject of the film is a radical Swedish girl, whose political-social attitudes find their parallels in American young people. . . .

Q. Mr. Zimmerman, did you notice the theme of the breakdown of the family structure?

A. Well, I think it was made very clear in relationship with her father, and this brought in—to me it was interesting that it brought together both the political and the social question, what we call the generation gap in this country, that the father's experience in Spain, having deserted the

anti-Franco forces, that this had lowered her estimation of him, and that has been a sore point between them, and that the political differences they have also create differences in the family. They don't communicate at all. They sort of mumble to each other. They have very little—It seems they have very little real contact, and I think this is true, this is happening as far as we can see in magazines and newspaper reports, this kind of breakdown over political issues as well as among others, happening in this country as well.

Q. What themes of social value in the picture did you find which have relevance to contemporary American society?

A. Well, the one that I just stated. I think the whole question of non-violence, which is particularly of interest to people of the heroine's age group—student or not student—in this country; the question of whether change can be effected non-violently, or the position of violence and non-violence in reform or in radical change. . . .

I think it is of interest to American audiences that there is much interest in the same questions in Sweden, that it is not simply an American dilemma, but it is one that has caused interest in all countries among this age, among others.

Q. In your opinion, Mr. Zimmerman, is the portrayal of the sexual scenes integrated and related to the main social themes of the picture?

A. Well, to elaborate on what Mr. Kauffmann said, I think that as well as being consistent with the outlook of the movie and with the outlook of the characters, I think that they also are useful in showing the relationship of the boy and girl. The sexual intercourse on the gate or on the wall in front of the King's palace—I think it is the King's palace—I'm not that familiar—I know it is an official building related to the royalty in Sweden—this is a gesture

of defiance toward the old order. I mean, if anything embodies the old order, it is the royalty in the country.

And then, as she learns of the deception on the part of the hero or of her lover, the last sexual encounter, the one out in the sort of—the retreat, is rather brutal and loveless and unhappy, and the sexuality in a sense expresses the change in the love affair itself.

And I think that to make the kind of impact, to leave this to suggest—I don't see how a director could show this without being as explicit as the director has been. I mean, in other films, you can drift away at a certain moment and leave the audience to suppose what happens, but to show in sexual contact an expression of an attitude and a relationship, I think it has to be done explicitly, as it has been done.

Q. Is it then your opinion that there is artistic expression—artistic justification for the inclusion of the sexual scenes in the film?

A. Yes, yes. I think they are necessary.

The next witness, John Simon, film critic for The New Leader, *was examined by Mr. De Grazia.*

Q. Would you please tell us, first, whether you thought this film embodied or expressed themes or ideas of social or artistic importance?

A. Yes, I think it does.

Q. Would you please describe to the jury in your own way the most important themes, as you see it, in this film?

A. I find that to me the most interesting thing about the film is that it is a film that shows the interrelationships of various aspects of human activity, and of the society in which an individual human being lives. That is to say, it shows that there is no such thing as compartmentalization but that what a person is in his sexual relationships, in his so-called interpersonal relationships, in his family rela-

tionships, is related to his functioning as a citizen within the society in which he lives, and that this is a two-way relationship. What the personal relations of the individual human being develop in him is transmitted to that human being's relation to the entire society, and, conversely, the way the society functions or malfunctions is also transmitted to the individual who lives in that society.

To become fully aware of this two-way relationship is an important thing, to me.

Q. What do you think is the meaning of the title of the film?

A. I think it expressed the natural, and I think healthy, curiosity of today's young people to find out more about the actualities and potentialities of their lives, of what they can do with themselves, of what they can do for the world they live in, and what they can do for their nation, for their society—for the world, in fact. . . .

I find that Vilgot Sjöman, the director, has done something very fine in that he has shown uniquely in the film the different types of film-making—different ways of telling the story feed into each other. He uses a technique called *cinema verité*, which, as you may know, is film journalism. It is a kind of candid camera reportage, interviewing people in streets and public buildings, and so forth, about their opinions. This is a technique that has been much used by modern film makers. But usually, usually a whole film is dedicated to this technique.

The way Sjöman has made his film partly this and partly a story film is another way of saying, I think, that reality—or as much reality as you can literally put on screen—is not to be compartmentalized away from fiction, from imaginative artistic viewing and rendering of life, but that the two can flow into each other, and that the so-called story and the so-called journalistic part of the film really interdepend.

And in many other ways he has shown the introduction of one thing into another in what I think is a realistic and to my mind quite original way.

Q. You mentioned earlier, I believe, that this film interestingly connected one's sexual life with one's political life. Is this common to American films?

A. No. I think we have more—Those of us who take films seriously are more forced to admit that we must depend on European films for our spiritual and intellectual sustenance rather than on American films. This is regrettable, and I hope it will not always be so, but as of now it is European films that really address themselves to what I consider the important issues in life, whereas Hollywood films especially, but American films in general, tend to be much more glossy, superficial, formula-oriented, and less willing to probe and maturely consider psychological and social and political issues. To me it is the novelty and contribution of this film, along with many other European films, that it shows a human being from all angles rather than from a narrow, arbitrary, limiting sort of point of view which serves only getting the story ahead—and the story being just the plot—without any deeper human significance. . . .

It shows that when sexuality functions well between two people, this produces a kind of hopefulness about the society, and an enthusiasm; and inversely, when the girl herein, Lena, is feeling good about Swedish society, even to the point where she imagines that non-violence has become the order of the day, her private life functions better, more happily, and her sexual intercourse is stimulating and life-giving and happy and healthy, but that when she discovers the deception of her lover, and when, consequently, their relationship becomes troubled and unhappy and painful, she finds that her ability to function as an inquiring reporter, as a worker for peace, as a champion

of non-violence, is also impaired by the fact that her physical fulfillment has been damaged and lessened.

Q. How would you say the treatment in this film of contemporary political issues compares with the treatment of political issues in the typical American film?

A. Well, I think it is more honest, I think it is more inquiring; it is more far-sighted, far-reaching; it is more adult.

Q. And how would you say the treatment in this film of sexual attitudes and activity compares with the treatment in the average American film?

A. I think this is one of the—I would unhesitatingly use the word "noble"—one of the noble things about this film, that it is unflinching, that what it has to tell it tells rather than pussyfooting up to it and around it. It does not leer, it does not smirk, it does not hint, it does not make prurient suggestions. It tells its story forthrightly and candidly without, I think, any excessive dwelling on anything except on what it considers vital and relevant. And I again agree with the previous testimony, earlier, that there are three or four films, for example, now to be seen on our screens in which such things as oral intercourse are hinted at in a distinctly suggestive way, but by the very fact that they make it on the one hand very plain what is going on, but on the other hand they don't have the courage to make it unmistakable, I feel that they portray a kind of dishonesty, a kind of Jesuiticalness which I think is an unattractive aspect of a work of art, whereas candor and facing the issues squarely I consider an artistically courageous and honest and salutary thing.

Q. Are there other films that you know about and have seen exhibited in the United States which in their sexual aspects go as far as the sexual scenes of this film?

A. Well, in the explicit sense they don't go as far, but I think a film that implies a great deal might in some

senses be said to go farther and farther in the direction of confusion, nasty insinuation, encouraging the viewer to fantasize and possibly supply indeed quite illicit things, where spelling out something might almost be said to my mind to be going less far; if by "going far" we mean overstepping some kind of sensible, healthy, sensible kind of boundary. If by "going far" we mean going far in the direction of honesty and attempt to understand, then this one goes quite a bit farther. . . .

Q. There was, however, a scene, wasn't there? do you recollect a scene where Lena was kissing her boyfriend's genitals?

A. Yes.

Q. Would you give us your opinion on the intention and meaning of this scene?

A. This scene to me shows a rather touching rapport between the two sexual partners at that moment, and it is an interesting scene because—well, first of all, let me say what it immediately does, and then what it implies. It shows that at a moment of sexual fulfillment which in this case apparently involved oral sex, the two partners in love—Lena and the young man—are made very happy by this, and feel a kind of devotion and dedication for each other, a freedom of each other, a bodily freedom as well as an inner freedom, so that their entire bodies became objects of reverence and gratitude, and I very strongly felt that in the kiss delivered by Lena to her lover's genitals she expressed a very touching, a very human, a very childlike, sweet and simple devotion and gratitude to him for the happiness, for the joy, he has given her. And it showed that this kind of, perhaps unconventional, I don't know, sexual relationship is in fact a fulfilling and a sustaining and a devotion-making relationship.

Now, what was then particularly interesting is that this

happened during a phase of their relationship when things were already going downhill, and when the fact that her lover had lied to her, plus her growing realization that non-violence was not really consistent with her spiritual abilities, has already cast a shadow on the relationship and on her self-awareness, and I think the implication is that even in such a situation, temporarily physical well-being can act as a contenting and positive factor.

But it also shows, I think, that ultimately this is not quite sufficient, and that when the psychological and moral aspects of the relationship are failing, are no longer satisfactory, that the physical satisfaction can be only a partial and a temporary and transient relief and release, an oasis in the relationship. . . .

Q. In the respects, Mr. Simon, that you have just related, that you thought the film went further than any other films in the sexual area, I just wanted the record to be clear. In those respects did you think this film was a better film and was important by comparison with the average film which is seen in this country? Would you couch your answer in terms of importance?

A. Yes, I think that in whatever respects it can be said to break new ground I feel that it makes a genuine artistic and moral contribution by being honest about sex, by showing the enjoyment to be derived from it as well as the problems it raises, by showing its relationship to other aspects of the human personality, and the social and even political situation of the world, and by trying to understand the human being from all its sides rather than as is customary from just one or two sides.

Hollis Alpert, film critic for the Saturday Review, *was examined next by Mr. De Grazia.*

Q. Would you say the sexual themes involved in this film have any importance, social importance?

A. It is my feeling that the characters in the film, notably the young girl Lena and the boy, are exploring sex to an extent in terms of, let's say a more honest approach than was true of previous generations. . . .

Q. Is the quality of honesty a matter of importance in this film?

A. I think it is of very great importance in this film, which is one of the reasons why I am here to talk about it. I have been concerned, as have many other critics, with dishonesty in portrayal of sex and sexual relationships over a great many years. I think this is one of the very few which has dealt with the theme and the subject with great candor and honesty and, to a certain extent, artistry. I find it a very important film, indeed, for that reason. . . .

The Reverend Howard Moody, Senior Minister of the Judson Memorial Church in New York City, discussed what he felt was the religious dimension of the film. He was questioned by Mr. De Grazia.

. . . Martin Luther once said that man's God is whatever he hangs his heart on, whatever he deeply believes in and is committed to, a kind of ultimate allegiance.

[This] film is sort of an exposure of the gods of the Swedish young people: Yoga, non-violence, sexual emancipation, freedom for all, class structure. All of these were an exposure of these beliefs and commitments of the young. And I think that whenever a film deals with this kind of subject in an open and honest way, it has a very significant religious dimension.

A religious film is not only one about theological subjects. A religious film is one that deals with the choices and the problems of human action and says something as a work of art about those choices.

Q. Then is it your opinion, Dr. Moody, that this film is a film of religious importance?

A. Yes. I think it is of religious import and of very important socio-cultural import.

I might say a word about the sex in the film, which is one aspect of it. I do not consider it the major aspect of it, but it is one theme amongst many themes in that film.

I might say that I believe that according to religious teaching, that sex is a sanctified part of human nature, but it is not sacrosanct. I might say what I mean by that: By being sanctified, sex is believed by the Creator as part and parcel of the human condition and made for the enjoyment and perpetuation of the species.

We have made it, I think, sacrosanct, that is, sacred in kind of a set aside way, untouchable, more than human.

The human sex in that film, I believe, from my own perspective, was not perverse, it was not sadistic, it was not violent; but it was straightforwardly human sex, and I might say parenthetically, from my own perspective, rather healthily heterosexual, which I deeply appreciated.

Q. Did you notice political themes in this film which in your opinion were of importance for contemporary American society?

A. I would say that very important moral and political questions are raised in that film. . . . I must say at this point—I have to say—most political questions from my own perspective, and from a lot of religious perspectives, are moral at base. When we raise a question about human actions, their collection together, their being governed, the ways in which they are governed, the ways in which they are fed and clothed, all of these things—the way they are looked at and treated, the amount of freedom and responsibility that is required of them by political forces, are basic moral questions from my own perspective; and I believe that film was full of them and raising some very significant questions in that instance about Swedish life. I think most

of us know that those same questions are familiar in American life. . . .

Certainly, the basic theme of the film, the one on which he hung the film, was the question of class structure in Sweden, and there was exposed all the prejudice and ignorance of the Swedish people regarding their own nation and the way it was governed, and so forth.

And I suppose one could translate it today in terms of America as to whether racism is something that exists, in the kind of probing and questioning that the film did. It is entirely relevant to our own situation, I think. . . .

. . . perhaps the dirtiest picture in the world was not the picture of a man and a woman making love but the picture of the piled up corpses at Buchenwald and Dachau; this was far more obscene and did more, far more, violence to the human situation, human action, than all our slick paper graphic essays on sex, the human body, and so forth. . . .

There is nothing obscene or dirty about the human body, but there is about men's violent treatment of that body, and this I felt was the real obscenity. . . .

On redirect examination by Mr. De Grazia:

Q. Dr. Moody, would you care, please, to explain your responses to the questions asked of you by the Government counsel concerning the sanctified sexual aspects of the scenes that he asked you about?

A. Well, I would simply say, because when I used the word "sanctified" for people I try to put a particular definition on it, namely, that it was a part of the creation believed by the Creator and given as part and parcel of the human condition and the human situation for the enjoyment and perpetuation of the human species; and that is what I mean by "sanctified."

And when you ask me if the sex in that movie is sanctified, I mean by that that it is normal and healthy in the way in which sex has been given to us in this world. That is what I wanted to say. I mean, I am not one to say that I believe that sex—I don't believe in sexual exhibitionism, and the question as put to me was not what was right or wrong, whether it was right or wrong to engage in sex on the balustrade of a government building. We haven't very much of that. It is a figurative way of saying something about the government, I think, which I won't try to vocalize.

I think it was another kind of statement in the film.

Q. In other words, the balcony or the balustrade scene involves Lena and her boyfriend in expressing a point of view about the authority of the government or the palace?

A. Yes, I do.

THE COURT: What point of view were they expressing, in your opinion?

THE WITNESS: Well, I would say they were saying, in a sense, "Screw the Government." That's what it seems to me they said.

Dr. Charles Winick, licensed psychologist, professor of sociology at CCNY, and from 1961 to 1967 a consultant on censorship standards at NBC, was questioned by Mr. Gallen.

Q. Could you tell the jury what conclusions you have reached concerning the changing standards in the movies concerning the expression of sex?

A. I think that when I did the report on *Taste and the Censor [on Television*, published by the Fund for the Republic, 1959] ten years ago, there was no doubt that the theater was the most liberal art form in terms of its ability to express sexual material, and it was pretty much on a par with novels.

I think, however, that in the last two or three years there has been a substantial change here, and movies, which were about ten years behind novels and the theater, now are accepted by Americans as expressing relatively liberal material that previously would not have been acceptable in a movie.

I think that young people especially look to movies for new ideas and new material, and they are willing to accept sexual content they may not have been able to accept before, and since over fifty percent of the movie audience in America today consists of young people between the ages of sixteen and twenty-four, I think that the expression of sexual material is of special interest to these young people who are trying to find themselves and who look to a movie not just for entertainment but for clues to understanding the world they live in, and increasingly they find such clues in movies like the British *Blow-Up* or the Yugoslav film *Love Affair* or the Danish film *I, A Woman*, all of which have been released in the last year or so and all of which show nudity, sexual relationships presented quite openly, outside of a marital situation and so forth.

And I think that this is part of the satisfaction that these films provide, that they deal with sexual material in an interesting way, and they not only have an entertainment value, but they enable these young people to perhaps understand a problem that they have.

I would summarize by saying that in the last five years and notably in the last two years, movies have moved to the forefront in terms of the performing arts in the freedom with which they present sexual material and, more importantly, to the extent to which their audiences anticipate that they will see sexual material presented in a relatively frank manner in films.

Q. In your opinion, does the presentation of the sexual material in *I Am Curious* exceed the expression of sexual

material in other films that you have seen during the past three or four years?

A. No. I would say that it is more or less on a par with the films that I mentioned. Perhaps the oral-genital scenes have not been presented quite so openly in these other films, but in terms of the larger context of the film, I think that this film, *I Am Curious*, is on the same level as those I have mentioned, which have been shown successfully and which are now taken for granted.

Q. In the course of your studies, have you become familiar with the expression of sex in novels or books?

A. Yes; I have.

Q. What is your opinion with respect to the expression of sex in novels and books as compared to the expression of sex in *I Am Curious*?

A. I would say that some best-selling novels present sexual material frankly, like James Purdy's *Cabot Wright Returns* [sic], Ken Kesey's *One Flew Over the Cuckoo's Nest*, and *An American Dream* by Norman Mailer, the *Beautiful Losers* by Leonard Cohen, and *City of Night* by John Rechy. These are all best-selling books published in the last few years.

I would say that the presentation of sex in *I Am Curious* is perhaps slightly behind the presentation in these well-known novels that I have mentioned, in that it is perhaps less—even less explicit than in the novels.

Q. Dr. Winick, were you asked to testify on behalf of the Government in this case?

A. Yes. I saw the film at the invitation of the Government, I think, on March 7th.

Q. And what did you tell them?

A. That after seeing the film I did not feel that it was obscene and therefore I could not testify to that effect. . . .

During the cross-examination by Mr. Schilling:

THE COURT: The question was, Doctor, would you explain the connection between the sexual intercourse in the tree, or on the tree, with the other problems that this girl had?

A. The choice of this tree I construed to be an expression of defiance of authority, which is one of the major themes of the film, by selecting what appears to be an otherwise bizarre locale for sexual activity.

Q. By "defiance of authority," what authority are you referring to?

A. Well, since part of the—since a major theme of the play is the girl's exploration of herself and her exploration of various aspects of Swedish society, this venerable tree, it seems to me, is a symbol of age and something that is very substantial, and since we do not ordinarily expect people to engage in sexual intercourse in a tree, this is an additional expression of defiance.

THE COURT: The question was, defiance of what?

THE WITNESS: Defiance of authority, what is represented by her father, by the Swedish Government, the Minister of Information* she talks to, and the King—in other words, the whole organized social structure of Sweden is kind of symbolically presented, symbolically represented by the tree. . . .

Q. Do you recall any scenes of cunnilingus or fellatio in the film?

A. Yes.

Q. Will you explain the difference between those scenes in the film and the social and political issues?

MR. GALLEN: The prior question had a conclusion of law in it, and it was answered before I could object. There is no cunnilingus or fellatio in the movie, and Mr.

*Actually, the Minister of Transportation, Olaf Palme.—*Eds.*

Schilling is aware of this point, because it was pointed out to him on the pre-trial depositions.

THE COURT: Whether he is aware of it or not aware of it, it is a question of fact for the jury.

I might tell the jury now to disregard the statements of counsel. It is their recollection which controls.

I will permit the question.

A. Well . . . just prior to the oral scene, the girl is involved in this episode with the non-violence, the altar and the material with Martin Luther King, and it seems to me that the director here is communicating by the use of oro-genitality—he is communicating in a contrapuntal way the element of non-violence.

In other words, morality is essentially a form of sexual behavior which is not aggressive in the traditional sense. That is, it is a form of sexual relationship which is passive on the part of at least one of the partners, and the director is juxtaposing two things.

Just as in her desire to meditate and explore fully the implications of non-violence in social life—Martin Luther King, the broken gun, et cetera—immediately thereafter we are shown the girl engaged in a sexual relationship which is also, in effect, non-violent and passive. And it seems to me the director is consistently trying to show us the relationship between orality of various kinds and passivity.

Thus, her father, who was a failure, has become a drunkard. He drinks, an oral person. Then, when the girl is disappointed, she stuffs cakes into her mouth in the drugstore. I think the director brings together these two things in a very provocative way, and each one helps to clarify the other. The orality, both on the part of the male and on the part of the female, coming just as it does, after the concentrated material on passivity, it seems to me, shows how in her personal life, even in sexual be-

havior, it is possible for her to be passive—in other words, non-aggressive—just as she tries to do this in her social life and in behalf of the cause in which she is interested.

Q. You testified that this film, *I Am Curious*, is more or less on a par with other films being exhibited insofar as its sexual scenes are concerned. Is that correct?

A. Yes; I would say so.

Q. Have you ever seen any other commercial feature motion-picture film that had an equal emphasis on male nudity, the male genitals, female nudity, and the female genitals?

A. A number of the Andy Warhol films have extended scenes of nudity in male and female—with male and female genitals.

Q. You would consider that was with equal emphasis?

A. No, because there the director doesn't seem to have the same kind of social and political commitment that this director seems to me to have.

Q. And are those films that you have referred to, if you know, films that are exhibited nationally in theaters?

3. *Chelsea Girls* has been shown in dozens of cities and been enormously successful, for example—the Andy Warhol film.

THE COURT: I don't get the word—

THE WITNESS: Andy Warhol.

Q. Can you think of any other films which have the equivalent amount of emphasis on male and female nudity?

A. Well, I think it is necessary to take the overall intent and theme of the film. It is not really meaningful to take the amount of time devoted to nudity or sexuality and make judgments from that.

Q. Whether it is meaningful or not, I would appreciate an answer to the question.

A. Certainly. Several of the Andy Warhol films, such as

the *Chelsea Girls* and a film like *I, A Woman* and *Love Affair* have perhaps as much, I would say, proportionately, nudity and non-marital sex and sex of a kind that is not traditional.

Q. You say perhaps as much, and you mentioned things other than nudity. Again, I would appreciate an answer to the question.

A. Well, addressing myself to nudity and sexuality, I would say that *I, A Woman* and *Love Affair* have approximately as much sexuality and nudity.

MR. SCHILLING: Your Honor, I ask that that answer be stricken as unresponsive. My question dealt with the emphasis on male and female nudity and on the male and female genitals.

THE COURT: I think he answered the question.

Q. Is there any commercial feature motion-picture film that devotes as much time to scenes of sexual intercourse as *I Am Curious*?

A. No; I don't think so.

Q. Is there any feature commercial film that deals with sexual intercourse with the explicitness and to the extent that *I Am Curious* does?

A. Well, the Andy Warhol films present Lesbian intercourse, homosexual intercourse, in great detail and on camera for much longer periods of time, and I think that the very explicitness of the sexual scenes in this film actually is relatively healthy, because we do not have to imagine what is happening and, therefore, the film is relatively unlikely to, it seems to me, to inspire people to fantasize, because it is so literal, whereas another film, where there might be a fade-out of a couple in bed, and then a shot of waves breaking and a window shade being pulled down—this is the sort of thing that would in fact inspire fantasies.

But in this film, the very literalness, it would seem to

me, would serve to quell fantasies that people might have. . . .

Dr. Edward Hornick, psychiatrist, was examined by Mr. Gallen.

Q. Doctor, in your opinion are the sexual scenes of the film related to the development of the main political and social themes of the film?

A. I think they are in this way: I think we come from a romantic background in the Western world where we so often think of the difficulties of growing up into the hazards of adult living in our social system, in our political system, in the hard competitive world outside that are mediated through sexual love. I think this is an ideal entered into by many, if not most, of us, that we find we are able to make a go of living as adults because there is some one person whom we love and who loves us, and that thereby we can face the difficult realities of, to put it kindly, not so good political systems, not so honorable social systems. But because somebody loves us, and we love somebody, we can find a meaning and a close personal family life level that makes sense to us.

It seems to me that we see in this girl tortured and torn as she is coming from this terribly broken home and striving for women's rights, and striving for the rights of the underdog, striving for the lower classes, really a striving for herself which she hopes to achieve through her sexual union which she hopes will eventuate in a marital union.

As you know, the thing that knocks this entire picture into a cocked hat is her discovery that the man not only has another girl friend, but has another girl friend and a child by the other girl friend.

So that it seems to me that in the general composition of a piece which has to do with her coming to terms with a grown-up world, and the values of a grown-up world, that

her hopes for a sexual and marital union with this young man, this twenty fourth, if you will recall—the first nineteen didn't count, but the others began to count because she began to look for some satisfaction for herself as well as the boy in her relationship—this was the one she pinned her hopes on. And when this was dashed, her bitterness burst its bonds and she went berserk.

Q. Doctor, in your opinion, would any portion of this film be offensive to the American public?

A. Of course. Of course it would be offensive, I think for the wrong reasons, but—

THE COURT: I don't think you asked him the reasons; did you?

Q. Well, would you care to comment or to elaborate on your statement, Doctor?

A. I would assume that this Court doesn't need to be told about the double standard about sex in these United States. There has always been one standard of conduct and another standard [of] what we do or talk about. This film enters right into the heart of the matter, if I might say so, in one of the most taboo areas we as Americans have.

I scrounged about in the last few days looking for data about what we know about mouth-genital contact and I could find nothing more recent, that I found reliable, than the Kinsey reports of 1948 for men and 1953 for women. . . . The Kinsey data indicates that well over 60 percent of their sample of Americans have mouth-genital contact.

THE COURT: I am sorry, I didn't hear you. Have—

THE WITNESS: Over 60 percent have mouth-genital contact, your Honor.

Q. Doctor, from your professional point of view, is the attitude toward sex as depicted in the film a healthy one?

A. Yes, I would say it even stronger. It seems to me that sex is used in this film by the director, or the writer, to represent the close, warm, tender, human, body-to-body

contact of two people who care about one another. . . .

Mr. Schilling cross-examined Dr. Hornick.

Q. Is it your testimony, Doctor, that a majority of Americans have intercourse in trees?

A. I don't have any data on that.

THE COURT: Does Kinsey?

A. Kinsey didn't study that variable.

THE COURT: The answer is no, Kinsey has no data on that?

THE WITNESS: Yes.

Q. Would your answer be the same for the balustrade of a public building with a sentry watching?

A. I didn't study the Kinsey data with that point in mind, but to the best of my memory from reading both volumes there is no data on balustrade sex. . . .

Q. In the absence of your recollection of any mention of this subject in the Kinsey report, is it your testimony, Doctor, that you are unable to tell us whether 60 percent of Americans have had intercourse in trees, or whether 60 percent of Americans have had intercourse on the balustrades of public buildings?

A. If you will recall, I think I was precise in saying that the Kinsey data validates that 60 percent of Americans have had mouth-genital relationships in their adult life. I made no qualification about balustrades or trees.

Q. You said that this film would be offensive to most Americans; is that correct?

A. I think it might offend many Americans. I have no data, but I know that mouth-genital contact, masturbation, and nudity raise hackles.

Q. When you say "might," would it? Is that the best you can do on the question based on your knowledge as a psychiatrist, the treatment of patients, and so forth? Is that as definite as you can be, that it might offend?

A. I said very definitely that I thought it would offend because of the long-standing prejudice of Americans about discussing, looking at, or confronting their own sexual behavior. . . .

But you know the higher the education of the person the more likely it is that the person himself or herself indulges in just that behavior. . . .

Dr. Thomas Levin, psychiatrist and associate professor of psychiatry at the Albert Einstein College of Medicine, examined by Mr. De Grazia, suggested that the film was religious.

Q. Would you define "religion" for the jury—that is, give your definition of it before you go on.

A. Yes. The film is a cinematographic attempt to create a ritualistic presentation of fundamental moral and ethical questions which man must deal with in order to—how can I say—referee between his impulses and his commitment to other men and his society. In that sense it is a religious film. And the ritual is a way we standardize and repeat the lessons that we are concerned with. . . . The film has to do with timelessness and the lack of personal boundaries in the quest for identity within an ethical life, personally and socially. The film uses a device of a particular young woman's search for her identity as an individual in an interpsychic sense—that is, internally, in herself—as well as her search for identity in a larger world and with other people in a larger world.

In that search she has to grapple with two fundamental issues. Those issues are the amount of commitment, personal commitment, involvement—love, if you wish—that she has in her relationships with other people; and, secondly, the amount of responsibility that she has in her relationship to a larger society.

The film uses the political area for exploring her com-

mitment to the larger society, and that issue comes around non-violence and peace. It uses on the personal level the shorthand of the expression of personal interpsychic organization, which is the sexual act, the sexual responses, and the sexual relatedness.

In both of these areas the young woman seeks through ritual—and I must emphasize this, that this is what struck me most about this, that this is a series of rituals—she seeks through ritual to establish a fundamental truth: Who she is in relationship to other people, people close to her, and her society.

That would be my estimate of the basic themes.

Q. When you speak of rituals in the film, Doctor, would you give some examples of that?

A. Certainly. In the political or social area you have the young lady going through a series of interviews, and the cinematographic artist chooses to present these interviews as little slices in which there is a questioning and a response. That questioning and response is repetitive. Sometimes the same person appears at different points responding the exact same way. The responses tend to be —I don't mean this as a literary judgment, but rather an emotional judgment—somewhat boring. And that is an attempt to create through repetition that which is common, that which is frequent, that which is unexciting. . . .

That ritual, that kind of thing, is what the nature of a ritual was, a repetition over and over again in order to elicit a fundamental common response.

It reminds me very much of responsive readings in houses of worship.

The second area of ritual is in the sexual area. I was very struck, and amused almost, that the sexual content of the film enters quite late in the film, actually, and its entrance into the life of the film takes place in rather, I thought, amusing circumstances: The young man and

the young lady involved have a great deal of difficulty dealing with realities, like I think getting a mattress in place, clearing off a hassock and books. . . .

There are many, many items which can be noted as ritual, including the clear presentation of the woman's search for ritual in her flirtation with Buddhism and meditation.

Again one of the most striking things is the ending note of the film, which I might note I felt was excessively moralistic in that the film, seems to say in the ending note that the wages of sin are disease. And then there is a scene which is a washing in the blood of the lamb, if I may use that expression, the baptism recreated, and they are washed from head to foot ritualistically in two side by side establishments in which they are attempted to be cleaned of the itch, I think it is referred to, but actually is a ritual to cleanse the soul.

The film then follows their interpersonal relationships in that the real sin is that they are both dishonest, and the young man some place—and I only saw the film once—in this area around this period expunges himself of his basic dishonesty, which is his dishonest relationship with a mistress, and discusses how he must end this, and also discusses his responsibility for his child, while the young woman involved makes her act of contrition and honesty by directly confronting the director, who in a sense is a certain kind of patron, and indicating that she is forfeiting a dishonest relationship, and then they both leave together.

Q. Are you suggesting, Doctor, that this film indicated some growth in the characters, ethical growth?

A. Most definitely on the young woman's part. There is the overt evidence which seemed to be on the young man's part. As a clinician, I have some doubts—because he so clearly is portrayed as a psychopath—he could be redeemed

so easily; but the young woman: I was very touched, for instance, with her resolution of a basic human conflict which I thought was so kindly and so beautifully and so sensitively portrayed in the film, which is her relationship with her father. I thought that was most touching, since this is the developmental task of young people. It was done very beautifully in the film. . . .

Q. What scene are you referring to, Dr. Levin?

A. I am referring to the scene where, after a very stormy and critical relationship between daughter and father there is a rapprochement. They come together, this daughter and father who in my clinical judgment have been bound in a very frightening and impendingly disastrous Oedipal relationship, about their mutual troubles, and the daughter reaches toward the father for the first time with real warmth—which in the nature of the film one would suspect would be charged with a good bit of sexual energy—and the father, who has been portrayed as a weak character once frightened at the task of being a father with a seductive daughter, I thought he dealt with that beautifully by singing a little Swedish folk song, apparently, in which he says so very—talking about a river, and it ends by saying—but young women must have young men who can dance.

That made me well up with tears, I thought it was so beautifully done, very beautifully.

Q. In your opinion, does this film deal with the question of individual responsibility?

A. This film brings in a contemporary saint to discuss the issue of individual responsibility, and in the film we have the presentation of the saint, Martin Luther King, who is presented as a saint should be presented, as setting parameters.

And the young woman in her internal dialogue with Martin Luther King keeps asking the question of individual responsibility. I think most definitely her whole

search is for a change from a young woman. A young woman is portrayed clearly at the beginning. The director's rejection of her is clear. He says, "You have no mind and no commitment." And she says, "Yes, but I go to bed with you and I act. What else do you want?"

And the director obviously wants more of a person than pure narcissism and self-interest. I am not quite sure I understand why this sets off the pursuit for greater meaning in her life, but that becomes the whole issue: what is her responsibility as an individual? . . .

I am not sure I responded to your question. Yes is the answer, if you ask if this is a search for great ethical commitment. And if it is attained. I think that is so. There is significant growth.

THE COURT: May I interrupt, Doctor? Would you state what you mean by ethical?

THE WITNESS: Yes, sir. Ethics, to a psychoanalyst at least—

THE COURT: No, to you.

THE WITNESS: Personally, sir?

THE COURT: What you mean by ethical. All I want to know is what you mean when you used that adjective.

THE WITNESS: Yes. I use ethics within the theoretical framework—

THE COURT: Couldn't you give me a short definition?

THE WITNESS: All right.

THE COURT: Isn't everything that man does ethical? Can it be defined rather briefly?

THE WITNESS: Ethics is to be distinguished from morality. Morality is a—

THE COURT: Don't tell me what morality is. My question is: Can you tell me what you mean by ethics?

THE WITNESS: Yes. Ethics are those parameters of behavior which are determined by an individual's scrutiny

of his life, its purposes, and the integrity of his total personality.

THE COURT: That is an individual appraisal?.

THE WITNESS: That's correct.

THE COURT: Thank you.

Q. Dr. Levin, would you mind characterizing briefly for the jury the sexual attitude of Lena? Was she trying to do something in this area? Did she succeed in doing it? Did she resolve any important problems for herself?

A. Lena's sexual activity in the film in itself is not particularly noteworthy. What is most remarkable about the film is the attempt to integrate her sexual activity as part of her total personality. And so while her total personal search is to attain warmth and closeness, reconciliation, acceptance, as seen with her father, for instance, in her sexual attitudes it is as though the film shows a freedom of the form of sexual activity without a knowledge of the content of the emotional relationship which I think changes in the film as she gains awareness of the difference between sterile, formal sexuality and experimentation and truly spontaneous expression of sexuality which reflects the mood and temper of the relationship.

Dr. Levin was cross-examined by Mr. Schilling.

Q. I believe you said that the sexual activity in the film s not particularly noteworthy. Would you explain the easons for that statement?

A. . . The activity itself is not noteworthy. I want to larify that. It is not noteworthy in that it seems to deal ith largely what young people deal with. Young people re involved in experimentation in position and place. In ny clinical practice—and I am not prepared to become a ociologist on that—and in my discussions with young eople, I have run across many a situation where sexual

activity has taken place in unusual places with great thrill, and that may be the park or the chemistry laboratory in a college, or things of this sort. So that the experimentation in position and place is fairly commonplace. Young people are supposed to do that, I presume.

The other elements are the sexual acts—fellatio, cunnilingus. I did pick up the end of Dr. Hornick's testimony. I can't give you national statistics; I can tell you that they are very common activities. And in clinical practice—I just haven't seen in my entire clinical practice, except for children, a single adult who has not either indulged in fellatio or cunnilingus, or wished to or grappled with their concern about wanting to and being ashamed about it or being revulsed by it, and knowing that they really want to. It is very common.

Q. Was your statement that the sexual activity was not particularly noteworthy—were you making that statement in terms of the significance of the sexual activity in the film, the meaning that it had for the film?

A. No, no. I said that the activity itself was not noteworthy. I think it is to the director's credit that he attempted to do something that analysts have been trying to do for years, which is to talk about what is the language of communication involved in sexual activity. Because sexual activity is not just sexual, it is a communications attempt. And the film attempts to portray that communication.

Q. What I am trying to learn, Doctor, is whether you think the sexual scenes are noteworthy and are significant, and if you do think they have significance I would like to ask you what that significance is.

MR. DE GRAZIA: I think he has answered that several times.

THE COURT: Once more will nail it down then.

Q. . . . For example, the intercourse on the balustrade

in view of the sentry, what is the significance of that scene?

A. It is: make love not war. It is a social statement: make love not war.

Q. Anything else?

A. It is mildly exhibitionistic in a protected circumstance. It shows good ego function, because if one has to be an exhibitionist one should choose an audience that cannot respond overtly. Other than that, nothing. . . .

Q. What significance in your view of the film was there to the scene of intercourse in the tree?

A. I think it was very amusing. I think it was a small touch of the absurd in that I think all man tries in his small and individual personal activity to reach a greater parameter. I think the two young people who say "we are having intercourse in the largest tree in Europe," as an effort of obtaining special significance, is humorous; it is a kind of touch of the absurd. . . .

Mr. Irving Fishman, Commissioner of Customs in New York, the government bureau responsible for seizing I Am Curious—Yellow, was examined by Mr. De Grazia.

Q. Did you order the seizure of the film *I Am Curious—Yellow*?

A. I did.

Q. How many times did you see this film before you decided to seize it?

A. Once.

Q. How many other employees of the Customs Bureau saw the film before your decision to seize it?

A. At the New York Customs Office, one other employee. . . .

Q. Have you ever worked for any educational, cultural or scientific organization, Mr. Fishman?

A. Do I belong to any?

Q. Have you ever worked for any?

A. No. I have spent my entire working career in the Bureau of Customs.

Q. Would you please briefly state your educational background.

A. I believe you asked me about my educational background; is that it?

Q. Yes.

A. I attended the College of the City of New York. I studied business administration. I obtained my degree in that subject. I attended the public schools in New York City. . . .

Q. Would you please state whether the film *I Am Curious—Yellow* in your opinion presents ideas or themes having social, political, religious, or other value. . . .

A. Social value. As I understand it— . . . as I understand social value it relates to the advocacy of ideas. These ideas may relate to art, science, drama, poetry—in fact, dance and sex.

Q. At the time that you were considering whether *I Am Curious* should be detained by your office at Customs, did anyone call to your attention the existence of a considerable number of reviews concerning the film appearing in Swedish and other foreign newspapers? . . .

A. When I saw these reviews I had already made up my mind to seize the film. The physical action, the preparation of the documents, perhaps, was not completed, but my decision had been made when I saw the reviews.

Q. Could you have changed your decision if you had read these reviews and been persuaded that the reviews required you to give another decision?

A. No, I don't think so.

Q. You couldn't have changed your decision?

A. No. . . .

On cross-examination by Mr. Schilling:

. . . We see— We pass on the average of a thousand

films a year, imported foreign films. I have never, in my forty years of experience, had presented to us in Customs a motion picture film obviously intended for entertainment purposes that consisted of hard-core pornography. And so my decision was immediate in this case.

MR. GALLEN: Objection.

THE COURT: Much too late.

MR. GALLEN: It is not too late to be stricken from the record, your Honor.

THE COURT: But nobody so moved.

MR. GALLEN: I move right now that it be stricken from the record.

THE COURT: Yes. I will grant it. . . .

MR. SCHILLING: Mr. Fishman, I believe you testified that in the past two years you have personally seen about twenty-five American feature films; is that correct?

A. That's correct.

Q. Have you, in the course of these two years, acquired information about American feature films in ways other than actually seeing the film?

A. Well, we subscribe to the motion-picture trade papers. We read the reviews published in these papers. We see a great deal of motion picture film in connection with our work, and naturally I try as much as possible in my personal life to see those films which have aroused curiosity and discussion in newspapers, plus, of course, motion-picture films which are not controversial at all.

I seek entertainment, and I try to keep away from the controversial films, except in connection with my duty. . . .

Q. Mr. Fishman, would you state the opinion you formed with respect to *I Am Curious* when you viewed it prior to your decision to seize it? . . .

A. I felt that the dominant theme of the film was sex. The scene of sex intercourse on the floor of Lena's room, the scene of intercourse on the balustrade, the one in the tree, the one in the lake, the scene in the cottage—

several scenes of fornication in the cottage, the scenes of fellatio, the scenes of cunnilingus—these helped me make up my mind rather quickly. . . .

Q. Would you tell us more fully what your opinion was with regard to the value of this film in connection with your decision to seize the film?

A. I explained in my earlier testimony that social value may advance ideas concerning sex. I admit that interspersed through the film there were some other ideas expounded.

I saw the film four times totally, but I did not leave the projection room with any message, no thought.

There were many scenes, interviews between Lena and the public officials of the Swedish government, but they conveyed no real social import to me. . . .

Q. Have you read *Memoirs of a Woman of Pleasure* by Joseph Cleland?

A. I didn't get that at all.

THE COURT: Have you read *Memoirs?*

Q. (*continuing*) Have you read *Fanny Hill?*

A. Many times.

Q. Is that a book which in your judgment is almost exclusively dealing with sex and sexual relations?

A. Yes.

Q. Is that a book which in your judgment nevertheless may have redeeming social importance?

A. My own view—

THE COURT: He is asking for your own opinion, yes.

A. (*continuing*) No. . . .

Q. Do you know that the Supreme Court of the United States has in effect ruled that that book has redeeming social importance?

A. Yes. . . .

Q. In reaching your judgment concerning the question of redeeming social importance in the film *I Am Curious–Yellow*, is it your testimony that you balanced or weighed

the social values or ideas of social value expressed in the film against the sexual material?

A. I gave all of the constitutional protection, the tests which we have to apply before we make a decision, consideration. The Bureau of Customs is not the final word in the determination as to whether material is obscene. Our function is merely to seek out that which we believe should be referred to the Court for final decision.

Your questions are directed to me as though I make the final decision. The Courts have told us that we are not to conjecture and study and spend a great deal of time weighing one phase of the matter against the other.

I believe that this film was sufficiently objectionable so that it should be referred to the Court for a final determination as to whether it is obscene.

Q. Mr. Fishman, I don't think you quite answered my question. I am trying to find out whether or not you weigh the social values that you find in a work against what you consider its prurient appeal in reaching your judgment of whether or not to seize.

A. Yes.

Q. You do weigh that?

A. Yes.

Q. It is also your testimony that you try to follow as best you can the decisions of the Federal Courts of this country with regard to obscenity?

A. Yes.

Q. Are you familiar with the case of *Jacobellis* vs. *Ohio* in the Supreme Court of the United States, decided in 1964, concerning motion-picture film?

THE COURT: I am not going to permit you to ask this man any of those questions, whether he applied the right tests or the wrong tests or applied them wrongly or inadvertently. That is not our problem here today.

Mr. Ned Polsky, associate professor of sociology at the State University of New York at Stony Brook, was examined by Mr. De Grazia.

Q. Are there ideas of any importance to you as a sociologist presented in this film, that is, ideas of social importance?

A. Yes. A good many. One, for example, would be the question of the extent to which it is possible to change a society. Lena, I think, goes through a good deal of questioning herself and others about this: To what extent political action can be really effective? Do we have to put up with things as they are, or should we try to change them? Other questions: the nature of politics, whether or not it is possible to adhere to a code of complete non-violence; the theme of violence versus non-violence as an ethical problem and as a psychological problem is portrayed very thoroughly in the film, both in relation to politics and to sex or sexual relations.

Q. Why are these ideas or themes important to you?

A. They are basic questions about— Well, essentially, let me put it this way: Sociology is the study of the nature of society and what is true of people by virtue of the fact that they live in a society; and the film, I think, explores a lot of these questions: the question of whether we can, for instance, adhere to a code of complete non-violence, no matter how frustrated, how angry we feel, and so on. And to me the most moving individual scene in the film, actually, is where Lena breaks down and says to Martin Luther King, "I can't make it. I can't really stick to that non-violent bit"—you know, something like that, some words to that effect. To me it was a very moving part of her struggle.

Q. Did this film present an answer in terms of the problems you have just discussed?

A. Yes and no. The film, I don't think, leaves one—or

at least didn't leave me—with any easy answers. But I think it presented, and I think it would present, especially to young people, the answer that it is necessary to struggle, it is necessary to try to find out the answers for yourself to these questions, not take any of these questions about politics or sex or the nature of society and so on, not take any of these questions for granted, that it is important to try to find out.

I think that would be the main, ultimate message, if you like, of the film. I think especially for young people that would be a message that the film would convey.

Q. Is there any social importance in the relationship with her father, with the heroine's father and with the older generation?

A. Yes. I would say that the relation with the father is one aspect of a theme that runs through the film in other scenes as well; for instance, in her interviews with Swedish tourists who have just come back from a visit to Spain, or in her interviews with labor officials—the theme of the younger generation often feeling that the older generation has made its peace with society, that it has in a way given up the struggle to change the society, has gotten too secure in its occupational positions to risk basic questioning of the society and so on, a theme which is one aspect of this, you know, struggle between the generations that is going on in the United States, of course, today, not just Sweden.

Q. Would you explain that, the relationship to the United States?

A. Well, I think we see it all around us. There is hardly a day goes by where one doesn't see in the newspaper young people protesting this or that aspect of the way the older generation is running things, sometimes getting quite violent about it, too, as in the case of, let's say, what has been going on up at Columbia University recently.

And you see also the theme, too, the question of violence against non-violence. . . .

Q. Is this aspect of uncovering of, in your judgment, facts which exist but which are not usually portrayed of sociological importance?

A. Certainly. Sociology is concerned basically with trying to portray the society as it is, whether we like it or not. Some of the things we find out we are very unhappy about. We would rather they were not true, you know.

We are concerned to find out, you know, what in fact is the case regarding sex or politics or anything else, whether it makes us happy or unhappy.

This is the point of any kind of scientific investigation.

And I think the film is quite valuable in doing just that, in portraying sex, first of all, as being bound up with all sorts of other things, not as a separate area of one's life but as being related to how one feels about politics, how one feels about one's parents, how one feels about the nature of the society one is in. The film, I think, is very realistic in portraying how all of these things are related to one another. I think if any one of them were cut out, as it were, it would damage the significance of the film and damage its power to move people. . . .

Q. You testified earlier that you have made sociological studies of pornography. Does that include pornographic films?

A. Yes.

Q. Could you tell the jury what in your opinion are the features of pornographic films? . . .

A. Yes. These films have several things in common. One of them is that the predominant material in the film is sex. The other elements of plot or character are either totally absent or just a scaffolding. That is, most of the film, most of the time, most of the actual running minutes of the film has to do with sex as a graphic—

Q. When you say "most" do you mean seventy-five percent, ninety percent, fifty percent?

A. Well, certainly well over three quarters of the running time, say, deals with actual portrayals of sexual acts and/or nudity. That would be one feature common to all of these films.

Another is that sex is treated in a fantasy way. There are no problems. There is no need for contraception. There are no unwanted pregnancies. There are no irreconcilable conflicts between the sexual partners. It is a kind of never-never land, in which both the man and the woman are eternally lustful and energetic and insatiable and so on, a kind of fantasy way of treating sex.

What else? Those, I would say, would be the two main distinguishing features of all of these pornographic films.

Q. In your judgment, in your opinion, are either of these elements of pornography present in the film *I Am Curious—Yellow*?

A. Not at all. Quite the contrary. Not only do the actual sexual portrayals take up a minority of the running time of the film, at least as I remember it, but even in those sexual episodes they are often portrayed in such a way that they don't function the way the sex in these pornographic films does.

For instance, in this film *I Am Curious*, unlike any pornographic film I have ever seen, you never see the man with an erection. You never see actual penetration of the man into the vagina of the woman. These are two staples of any and every pornographic film.

Secondly, the sex often takes place in settings where it is difficult to be sexually aroused, because the text is treated satirically. They are doing it on this balustrade, sort of as a gesture of contempt for the King and the soldiers and so on.

In other words, the sex is placed in a context in which

it would be very difficult for the audience to be sexually aroused.

Again, this is very unlike pornographic films. . . .

On cross-examination by Mr. Schilling:

Q. Let us consider the scene of intercourse in the pond or the lake. How would the film lose in social value if that scene were not in the picture?

A. That scene is part of the theme of violence and non-violence, and there, one of the messages to me in that scene is that often violent behavior, violent quarrels, are seemingly resolved—that is to say, people attempt to resolve them by engaging in sexual intercourse.

You remember what immediately precedes this intercourse or apparent intercourse—we never actually see it—but apparent intercourse in this pond, is some kind of violent quarrel, in which the girl takes, I think, his gloves and throws them out in the water, and they have some argument, and she goes and gets them, and then he goes out and grabs her, and there is some kind of struggle, which looks at first very violent, as if he may even be going to drown her, and then it immediately turns into a sexual kind of thing.

And I think that is a very realistic kind of portrayal of the psychology of human beings.

The Reverend Dan M. Potter, Executive Director of the Protestant Council, City of New York, and chairman of that organization's Committee on Motion Pictures, was called as the Government's only witness; Mr. Schilling examined him.

Q. Do you recall the scene of intercourse in the film on the balustrade of a public building, with a sentry looking on?

A. Yes; I do recall.

Q. From a religious viewpoint, in your opinion can it be said with any validity that the portrayal of sex in that scene is sanctified?

A. Is sanctified?

Q. Yes.

A. It is the most ridiculous thing I ever heard of. . . .

Q. . . . Do you recall the scene where the male lead takes the rifle away from the girl and throws her on the ground, lifts her dress up? Do you recall that scene?

A. Yes; I do.

Q. From the religious viewpoint, would there be any validity to the opinion that the sex portrayed in that scene is sanctified?

A. Well, no. I am wondering what the definition of sanctification is in this setting. Normally, "sanctified" implies that this is in a religious context, in which God is blessing a relation, and usually the marriage service; in most all of our communions is a marriage service in which a prayer of invocation, asking God to sanctify this union or to bless this union, is what we normally think of as sanctification.

I can't imagine throwing a girl down, out on a street someplace, or, as in this instance, in front of a building, and virtually equivalent to raping her, being considered sanctified. It certainly would have no theological justification in the way that word is usually used in theological terms.

Q. Is there any theological justification for the following definition of "sanctified"? "Sanctified in the sense that it was a part of the creation believed by the Creator and given as part and parcel of the human condition and the human situation for the enjoyment and perpetuation of the human species"?

A. Well, a portion of that would be orthodox, would be in the same sense that I was using it before, in a set-

ting of a formal service where prayers are involved and God is asked to bless a relation. In that sense the word "sanctification" is used.

As I gather from the way you have read the statement there, that the author of the statement is saying that any relation that appears to be natural is sanctified by the Creator or by God. I think that is not applicable to this situation. This is not a natural relation, and it certainly is not believed by God in the way that this is being conducted, by any orthodox interpretation of theology that I know of. . . .

Mr. Gallen cross-examined Dr. Potter.

Q. Dr. Potter, have you ever testified before in court in a proceeding brought by the Customs Office to seize and destroy a film?

A. Yes; I have.

Q. Would you please tell the jury the case in which you so testified?

A. I testified in *491* and in *Erotikon*.

Q. For whom did you testify?

A. For the Government.

Q. And would you tell the jury the result in both cases?

A. I don't know.

MR. SCHILLING: Objection, your Honor.

THE COURT: Wait—

MR. GALLEN: No further questions.

The director of I Am Curious—Yellow, *Mr. Vilgot Sjoman, came to the United States from his native Sweden to testify on behalf of his film.*

Q. Would you state the names of the five films which you have directed?

A. The first one was called *The Mistress*. The second *491*. The third was called *The Dress*. The fourth was called *My Sister, My Love*. And this one.

Q. The fifth is *I Am Curious—Yellow*?

A. Yes. And the sixth one being *I Am Curious—Blue*.

Q. *I Am Curious—Blue* is a different film from *I Am Curious—Yellow*?

A. Yes.

Q. Would you explain the difference, please, briefly?

A. They are made in the same way and the same style and the same stories are repeated again. I would say, to make it short, that it also starts from the same beginning and ends in the same way, but in the *Yellow* and in the *Blue* you get a different side of Swedish life in each.

Q. Would you tell the jury, please, the significance of blue and yellow?

A. This is the national colors of Sweden, yellow and blue, and I wanted to tell that this is the same film, but I also wanted to separate them, and the best way to do it was to put the colors on them, I thought. . . .

Q. What was the dominant theme of this film?

A. I wanted to make a portrait of Sweden right now in the late '60s as I experienced my country. I started out by thinking of it as a kaleidoscope, because I didn't want to limit my ideas to a narrow and written screenplay, but I wanted to have a large form in which all kinds of ideas could be used, ideas that somehow reflected the conflicts and the climate of Sweden right now. That is to say, that a lot of the things in the film are referring to what is actually going on and bringing the discussion and some of the questions in Swedish political and social life onto the screen, which hasn't been done before in our country.

Q. What are some of those social and political themes?

A. One thing that is illustrated in the film is the question of [a] republic or abolishing [the] monarchy. There are several references to that. And that is part of the main theme, that I wanted to discuss and portray the feeling you have about the Social Democratic government that has been in power for thirty years, and the question if they

have succeeded in approaching a classless society or not, what kind of hopes for the future, and what feelings of failure you do have. So there are several examples of that kind.

Q. Would you give a few examples of how you explored that then?

A. Yes. The labor movement is very well organized and established, and the system is [that] every two years, every year, is brought up the question of the payment of the laborers. And you have a feeling of a great distance somehow between the actual working people and the labor movement. And so we entered the labor unions, their headquarters, and asking them questions in a simple way how they felt about the class structure of the Swedish society. That is one thing.

We approached [a] minister in the government, Mr. Palme, and asked him what he thought about the present state concerning the classless society. And then we asked people in reference to—there is a big trend, all Swedes are traveling to Spain, for the moment to Mallorca and the Canary Islands, and it is surprising to me that they don't have any—that it doesn't present any problems, apparently, to them—or does it? We ask all this kind of question. And then we went out to ask them in interviews.

And then the question of how Swedish young people do react to what is going on in the world of today, the relation between dissatisfaction at home and concern for the rest of the world, reflected in the demonstrations which are actually taken from actual things going on.

Q. Would you try to explain the ways in which you developed some of the other moral and social problems which in your judgment are confronting Swedish youth today? . . .

A. I will put it this way. If you are going to make a portrait of your own country, what is going on, you are making

documentaries, interviewing people. Then if you don't have a focus for that theme, somebody who is trying to understand this won't get any feeling for it. So that was the main reason for building the film around Lena, the theme being that you must be concerned with this little girl who is a simple, ordinary kind of girl with a lot of ideas and feelings, and you will feel how she is developing, how she is reacting toward her society.

So that is why I by and by developed things around her, and the main theme being the relation to the father and disappointment in the father, and then her relation to the boys, then mainly one boy. And, of course, I think in portraying Lena we tried to portray a very sort of new and modern kind of girl that hasn't been portrayed very much on the screen, a girl who asks for the same freedom as men always have done, and who is sort of unconscious of what is going on inside her.

She has a lot of emotion that she doesn't know about. She tries to behave with the same freedom as the boy, and the same attitudes. The whole thing being her story while she discovered that inside herself is going on things she didn't know about and doesn't know how to handle.

But I am thinking of her as a portrait of a new kind of female, young female, coming in the front light of our country. . . .

Q. Did you also in making this film, Mr. Sjöman, seek to make, to explore new techniques in film making, techniques which are new for you, or perhaps otherwise, in the film world?

A. Yes; I surely did.

Q. Would you mind describing a little bit what you did, to the jury? What you tried to do?

A. Well, from my point of view, it was sort of liberation from the school I had been going to when I went to Bergman's school and was a pupil of him—and he was

building very strict scripts, which you had to stick to, and then you had the whole equipment of the studio, and you had all kinds of traditions and ideas in film making.

And then I said I better break with this and go out on my own and invent things, and especially I felt that I could, if I came close to the actor[s] and could discuss with them very openly about certain things that came along, I could get their experience. . . .

I got in touch with young actors and said, "Look: What is your experience? How do you experience life, and what should you do in this situation?"

I didn't force my ideas upon them. I tried not to. A lot of the material and the attitudes in the film is brought in by the help of the actors. I have an idea about what a young girl is, and Lena had another idea about what a young girl is, and these two ideas clashed or merged, and I felt that I got more close to realities with the help of the actors. It is such a technical thing to describe how you work with the material. I can say that, in short, it was a sort of experimental field, where I tried different techniques, bringing myself and the crew into the film, playing, so to speak, with reality. I mean, the audience would suspect that the main situation between Lena and me was the real one. Of course, Lena and I knew perfectly what was the reality, but we played with this impression that this is the full reality we are presenting on the screen.

You can say that I moved in the difficult field of psychodrama, where you try to take the experience of yourself or the actors, use that in the film, in the making of a play or a film. . . .

Q. How do you feel now about the film?

A. Well, then if I try to look objectively on what I have been doing, I can say I think I succeeded in two things: One was bringing the political discussion of my country

into the movies, which hadn't been done before, and people had asked for that. They didn't feel that movies were close to their life. And I think I actually succeeded in bringing that to the screen.

And also I think that in the ways of portraying Lena and Börje's love story, I think I accomplished something which was good, because I succeeded to a certain extent in breaking away from a lot of artistic clichés about how love scenes should be made.

Mr. Sjöman was cross-examined by Mr. Schilling.

Q. Mr. Sjöman, would you elaborate on the statement that you succeeded in this picture in breaking away from artistic clichés in making scenes of love-making?

A. Yes. I have been making four films, and every time the actors and I have to cope in these films with the love situation where love and sex are going to be portrayed, I felt that we were very traditional, and we relied upon clichés of American, French, and Swedish films, a very heavy tradition of clichés, and I felt stuck with it and said, "This is not fresh; it is not the way people behave. I am not achieving something as an artist if I am just sticking to these clichés." . . .

And so in most cases I asked Lena and Börje, "How do you feel about this, as young people? How would you approach this girl? How do you think she behaves in this case"—and so forth and so on. So they came up with their ideas about it, confronting my ideas.

And I think I have succeeded to some extent of breaking down—of getting away from the clichés. What I feel is missing is, of course, is a more mature relationship, the warmth and the tenderness that you have in a more mature relationship. This is a very young love story. You have two people who are sort of using each other's bodies. It gives a sort of chilly atmosphere around it."

After making the film, I said if I could make the love scene something like this, and I could have the same warmth and the same human atmosphere as I feel I have succeeded in one scene of the film, that is, the one scene between the girl and her father in the shop—he is drinking wine and singing, and the girl goes—is going—through all kinds of emotional stages—that scene, to my mind, with the help of the actors, has become very warm. It has all the humanity.

And I think if I succeeded in merging this—to doing non-conventional, not cliché sex scenes, with all the warmth of that scene, then I should achieve something the next time.

Q. In your answer you made no mention of any personal inhibitions that entered into this situation. Is it not correct that one of the reasons for desiring to break these sexual clichés is that you yourself felt personally inhibited in your work as a director in making these love scenes?

MR. DE GRAZIA: I think he just answered that, your Honor.

THE COURT: Then we will have it once more.

A. Yes. I think I mentioned it when I said that every time in the first four films I had to make a love scene, I felt very inhibited, together with the actors, inhibited in the sense that instead of the good thing for a director or an artist in general to approach it fresh and say, "What is your experience? How do you feel about this? What does reality look like? How are you going to transpose that into your novel and your play and your film?"—instead of doing that, then you rely upon what is done everywhere else, and then you are bound to [come] away with a bad result.

So when you feel inhibited as a person, then you are sticking to the clichés. And I did that in those films.

Q. One of the things you were inhibited about was the portrayal of male nudity in films; is that not correct?

A. Not correct. I was inhibited in many ways. So I would say that this was my general problem as a director. I didn't know how to cope with sex or politics. . . .

I would like to say this: My experience during the making of the film was that at the beginning you think of portraying actual behavior with the help of the actors as very difficult . . . and then when we got together and discussed the things, we found that it didn't present so many problems of inhibitions as we thought.

You are asking for a self-analysis, which I am not really able to elaborate on too much, since I don't know myself that much. . . .

Q. You set out, did you not, to break sexual taboos in film making when you made *I Am Curious*?

A. I set out to break away from certain clichés of how love scenes should be made, yes. That I did.

Q. You set out to break sexual taboos, did you not?

A. I set out to break away from clichés in film making, yes. And if you do affect the sex taboos, then that is another thing that concerns society in general.

I was concerned with making the movie in the way I wanted to do it.

I don't understand your question. The reason why this becomes a little unclear to me, when you ask this question, you put such an emphasis on male nudity, so in my turn I would like to ask you why. There are certainly female nudity clichés, and the female body is exposed and used in all films that way, that is very familiar with everyone and everybody. So if you discuss nudity, I would like you to bring both up to discussion. . . .

I don't know if you have noticed that I tried not to do what is usually done in the films in point of view of sex, portraying the moment of orgasm. That is usually, very often, tried by symbols. I am not doing that in any place. I think the interesting thing is what is going on before and afterward, and I try to show that in these films.

Nothing is really happening in the mattress scene. They are just having a lot of trouble with the mattress and the clothes.

I would add one thing, too, which I think is important. People are so used in films to add things and read into the pictures things that are not there, especially American films. They work on two levels. They show one thing and then they expect the audience to fill in the gaps. You have a dissolve. They are kissing or embracing, and then you have a dissolve.

There are also all kinds of other ways to do this kind of trick. But the thing, the main thing, being that the movie audience is so used to read things into it, so when they are confronted with several of the realistic pictures in this film they continue to read things into it.

For instance, in the scene in the tree in the countryside what is actually presented is Lena and Börje trying out, with their clothes on, an undiscovered, a sort of funny sex position in the tree, but they have their clothes on. And then Börje starts to take off his pants, and then he approaches Lena, and then suddenly, as in real life, they are in the middle of discussing something else then, instead of having an intercourse—they are discussing her feelings for her body, and she has a confession, a sort of very tender confession to him, that she doesn't like her own body, and her first nineteen lovers didn't give her any pleasure.

This is often referred to as a sexual intercourse scene. I can only explain that in terms that the audience is so used to read into the pictures things that are not there. . . .

Q. Would you say it was generally correct that it was your objective in making this film with respect to the sex scenes to show things as they actually happened?

A. Yes, to break away from the ordinary way of presenting very arranged love scenes, and to approach reality

and reconstruct reality, and to give the audience the feeling that this is more likely to be the real behavior than what is shown in many other films. But I must add one thing: that part of the intention is also to satirize, so there is also a lot of parody. Since you are particularly talking about the sex scenes now, there is a lot of parody and satire in the tree, in the pond, or the swamp, the balcony scene. All these are not supposed to be ordinary, realistic behavior but I am making fun of certain things.

Q. In the scene where Lena was fondling Börje's genitals, this is the scene in the country after the rifle is taken away from her, in the filming of that scene did Lena actually kiss Börje's penis?

A. If you mean—it is a question of touching. Do you mean if her lips actually touched his penis?

Q. Yes.

A. I can't answer that because I wasn't that close, and I can't tell from the image, either. I have a feeling it was possible for her just to have her lips a couple of millimeters above the penis. If she actually touched it or not I didn't ask her, or I didn't ask him, either. My experience with actors is that they sometimes enjoy the situation and they kiss very heavily in order to get emotional life out of it, and some of them—I am talking about ordinary kisses, mouth to mouth—and some of them are sort of chilly and just doing it technically, or sometimes touching beside the mouth. . . .

Mr. Norman Mailer was questioned by Mr. De Grazia.

Q. Are protest movements of the type you have written about the type also involved in the film *I Am Curious—Yellow*?

A. I felt there were great similarities. In looking at the film, one of the things in the film which fascinated me was the similarities and the differences between protest

movements in Sweden and in America. I was impressed on the one hand with the sophistication of the protest movements in Sweden. Primarily because it is a European country, they are used to strife and profound disagreements between the citizens of the country. I was impressed with the almost good-humored air with which opponents talked to one another.

For example, the girl was questioning the tourists either going to or returning from Spain. Many of them seemed amused by her when she questioned their moral right to go to Spain. For me it was a sort of light air of comedy in various sections of the interviews. There was a sense of almost kittenish or puckish amusement about the seriousness of the girl, this militancy of the girl, the dedication of the girl, and the relative sophistication or simpleness of the people answering her. . . .

Q. Was the heroine in the film *I Am Curious—Yellow* involved in any protest or quasi-revolutionary groups?

A. It was my impression that she was, yes. Not in any formal sense. In other words, it seemed to me she, like so many of the young today—you know, the young today—my impression is that they do not believe in formal alliance with political parties the way they had to during the depression or shortly after the war. And so, like many of these young kids, she was around the fringes of these movements but in fact the fringes by now seem to be almost more important and impressive than the core in their numbers.

She was interested in the Russian Communists and what they had to say as personified by Yevtushenko's visit. She demonstrated in front of the Russian embassy. At one point in the picture she attacked America.

Like so many of these young children all over Europe and America, she was in a state of great obsession and interest with public affairs, and that I thought was typical of many American youths today. I felt that she was repre-

sentative of the youth today not only in Europe but also in America, I would say. I wouldn't say that she reminded me exactly of an American girl, but reminded me of young people all over the world.

Q. Would you please state whether you felt the film *I Am Curious—Yellow* had artistic importance.

A. Well, if I may, could I take my time to get to that point, because the problem was a large one for me before I went to see the picture, and if I might I would like to present a deep reservation I had about the picture before I saw it because I think the question is attached to the answer. In other words, my preliminary remarks are attached very much to the answer about the artistic merit or lack of it in the film. . . . I have thought a lot about the problem of sexuality in movies. I have been obsessed with the problem and concerned with the problem and devoted to the problem in one way or another for twenty years of writing novels.

After all, this is not a simple moral problem. There has been a great preponderance of, let's say—put it this way: there have been many victories that have been won by people who believe in greater liberty in the arts, and I have been one of those people. I have been engaged in many of these campaigns. My own books very often were considered, certain of them, in their way, as opening new possibilities for liberty to write about sexual matters. But I have always been concerned about it because I don't think it is an easy liberty or a liberty that can be necessarily pursued promiscuously. I think it is a dangerous liberty.

In movies, of course, this danger is more obvious and more self-evident because movies affect the emotions so powerfully. Before I saw this movie, therefore, I was a little bothered because I had a feeling for a long time that the history of movie-making was moving to the point im-

plicit from the beginning, to the point where through stages the makers of serious movies and serious actors finally come to showing actors engage in sexual intercourse on the screen. Everything in its history shows that it is moving to that point, and this film comes closer than any picture we have yet seen.

So when I heard about it I had already written in *Esquire* about a year ago that I did not know if I as a film director even welcomed this; it bothered me very much. The reason it bothered me is something that has a deep relation to the problem of the actor in Western civilization.

The actor began as someone universally despised. The actor let's say five hundred years ago was despised because they felt that the actor was doing something that was half diabolical; he was playing with emotions, considered a dangerous thing to do. Women weren't allowed to be actresses in the beginning, in the Elizabethan theater.

This distrust and uneasiness carried to the modern time where, since we are vastly more liberal, progressive, and open-minded about these matters, we tend to accept the actor kissing the actress.

Actually, the problem remains—and it is a deep problem—because if the actor and the actress devote themselves to a sexual act in order to create art, then you get to the point where art then is becoming more important than the sexual act, and that is an enormously moral matter to me, because if art is getting more important than the sexual act, then we are involved in a debasement of the sexual act.

So I approached this movie with great trepidation because I felt that I might not like this movie, I might find that it would profoundly violate my sense of what is proper in these very dangerous matters, because I felt there was something very uneasy to me about the thought of an actor and actress becoming engaged in such acts that deeply for the sake of art.

When I saw the picture I was extraordinarily moved by it in a quiet way. I thought I would find the picture uninteresting from what I had heard about it ahead of time, the way it had been spoken of in various announcements, and from what I had heard of it from the contesting parties. I had the impression the picture would prove to be a shocker with a lot of dull matter. In other words, I had the impression it was going to be a documentary with a lot of overt sexual matter, and it would be interesting only because you have the problem posed of what you are going to do about it.

I was not prepared for a picture of the artistic dimension of this one. I think it is one of the finest and best pictures I have seen in a long time, and I was very moved by it, and I found that in fact I was somewhat overcome by it because I felt the portrayal of the girl in that is almost bewitching, because she is so complex.

I was left in a curious way when the picture was over. I was left with a sense of deep admiration, almost of awe, for the complex and mysterious nature of women. I thought that the particular forms of suffering and self-discovery she goes through in that picture, that odd mixture of coquetry and childlikeness in her, that sense of almost zaniness in her, opposed to the bitterness in her, and the cruelty in her, and the sense of someone partly beautiful, partly crippled emotionally, sort of very ordinary on the one hand, sort of magical on the other—I thought that a magnificent creation. I thought how mysterious we are as people.

So I thought while the picture moved into a terribly dangerous ground I could come on the stand and testify in its favor, to say I think it is a profoundly moral movie.

By that I don't mean it is a simple movie, or that the problems raised are absolutely answered by it. I think they are answered by it if we are willing to take the view that modern times are dangerous times and that we live

in relation to a series of absurdities. So that, for example, we have thirty thousand people who are killed every year driving automobiles, which is more people than are killed in most wars, yet we don't say that we must dispense with the automobile because it is necessary to modern civilization.

So we have to deal dangerously in the arts with many of these matters. So I think this picture, while it deals in a dangerous fashion with dangerous subjects, nevertheless has a moral authority that left me with a feeling of awe. I felt I had encountered a major work.

I felt it was one of the most important motion pictures I have ever seen in my life because it attempts to deal with the nature of modern reality, the extraordinary complexity of modern reality.

There is the fact that on one hand we are witnesses to a documentary, so to speak, because as we are walking down the street someone interrogates us, asks our opinion about something. On the other hand, we are people with ideas, passionate people with ideas that we want to fulfill. Then we have personal complications in our life that do not necessarily have any relation to it. Sometimes they act exactly the opposite of our personal ideas as our contradictions reveal themselves. We are good and evil moment by moment. We are interesting, boring; we are tragic, comic. We are satiric. On top of that we don't know the nature of our reality because it keeps shifting.

I think ahead to a few years from now when we have home movie cameras and home video screens which seconds later reflect and mirror our actions, when we can start taking movies this second and can see them on the screen immediately. At that time we will have difficulty in distinguishing when does the reality begin, which is the reality, when you are being photographed, or five seconds later when you look at it on your own home individual screen?

In this picture there are a great many attempts to deal with the immensity of this problem. For instance, the director. You don't know whether these people are real actors or figures in a story; whether the director is a character in the picture or not. You see the cameramen in certain scenes and not in others. For instance, you see the cameramen being cameramen.

All these factors come together, I think, to produce a work of art which is a substantial and major work of art, and I think it is one of the more impressive movies I have seen in my life.

Q. Mr. Mailer, I think in part you began to answer my next question, but I would like you to state in your own way, if you can, any of the areas in which you felt this film had for you a moral or a social importance.

A. I think that I tried to cover that in what I had said earlier. I think the moral and social importance for me consisted of the fact that the director was in my mind a serious artist, in fact an artist with major talents, with large, powerful talents, who was attempting to perform the work of the artist, which is to present his vision of existence. The artist bears in the twentieth century an extraordinarily odd relation to society that he did no necessarily bear in other countries, because society is founded primarily upon law and the church, or, if you will, religion and law. These have been the two main guidelines of society until the twentieth century. It is only in the twentieth century that we come to feel that despite the majesties of law, and of religion, that there is something accelerating in the twentieth century at such a fast rate that religion and law, by the very fact they are institutions, and stable institutions, are not changing quite so rapidly as the nature of life.

That does not mean religion and law are to be ignored or are valueless. It means people wander through more and more empty spaces not immediately touched upon by re-

ligion and law, and it is exactly in these empty spaces art comes in and attempts to deal with the nature of modern realities, the modern realities which make us make moral decisions every day of our lives.

Whenever we have to make a decision and have to decide is it good to do this or that or is it bad to do this or that, and we have no experience, we have no guideline, then we are in what people have come to call the modern condition; we are in a state of confusion. . . .

These spaces, as I would say, these empty moral spaces, these spaces where judgment is difficult because of the lack of experience or knowledge, are filled by artists well or badly. I think the importance of art in the twentieth century, the reason there is such enormous interest in the works of the artists, apart from the fact these works are now presented so quickly to the masses at large, is that artists by virtue of their freedom have the opportunity to attempt to give you their vision of society.

Modern society is so complex that very few artists ever can give you a vision that is of any use, and I found this vision of this director Sjöman to be extraordinary because it was comprehensive, because I could look at the life of these people in Sweden and have a feeling somehow or other, and I could hardly say why, that my own life now has a better sense of proportion. I began to see the absurdities, and the areas where these problems arose that I couldn't decide for myself, these terrible moral problems, began to have some focus.

The main thing about the picture was that it gave me a good feeling finally about men and women, particularly about this woman in this picture. I had a feeling they were all more noble than I thought before I saw the picture. The picture left me with a feeling of—I heard the word sanctity used here yesterday, and though I wouldn't use that word, I would say that I felt slightly shriven, a slightly more

moral man, and that is a rare feeling to get from a movie.

The moral and social values are to me self-evidenced through the emotions that the picture aroused in me and left me with.

Q. Do you think the importance in these ways the film had for you and has for you can be shared by other persons in America, if they see the film?

A. Well, I can say that I think so. Of course, there is no further authority than the fact that I think so. To the extent that other people are like me, they will perhaps react in the same or similar fashion. I couldn't go further than that.

I think it is—I can only say I think it is a highly moral picture and at an extraordinarily sophisticated level of morality. It leaves us to deal with morality in an area where the most desperate chances have to be taken at times. In other words, someone who is profoundly religious could say that these actors may be endangering their mortal souls. Nevertheless, what we are given in return is an insight into the profoundly troubled and vital and tortured and magnificent and comic aspects of the sexual relation in young people who are living between ten ideologies and fifty different passions and ambitions.

Mr. Schilling cross-examined Mr. Mailer, first asking if he thought his own "opinion a reliable indication of whether the movie will or will not shock the American public?"

A. I will not pretend this movie is not going to shock anyone. Obviously, it will shock certain people. Any number of activities shock people. If a man walks down the street and he spits in the street, it will prove shocking to certain people.

Q. You said after you saw this movie you were left with a sense of awe about the mysterious nature of women?

A. Yes.

Q. You don't mean to suggest that before you saw the film you did not have a sense of awe about the mysterious nature of women?

A. No, you are absolutely correct. Before I saw the movie I had a sense of it; it was just that that sense was deepened by the movie.

Q. You stated that you were obsessed with the problem of sexuality in movies?

A. Yes. May I answer, or is your question not finished?

Q. My question to you is for you to state the ways in which you are obsessed with the problem of sexuality in movies.

A. Obsession is a particularly powerful word, and to me what it means—because it is a word on which there is not general agreement—is that you keep going back in your thoughts to this place and you don't have an answer. In other words, you keep going back to a point.

Let's say something happened in your life at a given moment that caused you some amount of difficulty, and you keep going back to that point and saying to yourself, was it my fault, was it her fault, could it have been avoided, was I evil, was I good? That sort of thing. We keep thinking about it and keep going back to it again and again.

For example, when we remember a friendship that has been broken up we keep trying to think, was it his fault, was it my fault? Such matters are obsessive.

When I say that in connection with movies what I mean by saying the idea of sexuality in movies is obsessive to me is that I have been concerned about this because I have seen it coming, I have seen the day coming when actors, by the logic of their art, would wish to indulge in sexual intercourse to fulfill the need of the picture.

I did not know how I felt about it. It was a burning matter. I kept coming back to it. I kept saying, "If I were a movie director, would I do it or not?" I couldn't answer it for myself.

When I went to see this picture I went to see it, as I say, with a sense almost of reluctance, because I didn't know if I necessarily wanted to start contemplating this problem at this moment.

Q. You stated that the danger in portraying sexual intercourse and other sexual acts in movies is that the art might become more important than the sexual act, is that right?

A. Yes. I have many conservative opinions, and one of them is the sexual act must be protected.

Q. Is it your conclusion that in *I Am Curious* the sexual act was more important than art?

A. Well, because it was a work of art I think something happened. You see, the sexual act is more important than art, in my opinion, but it is not necessarily more important than works of art, because works of art are also mysteries. In other words, when I call something a work of art I mean it leaves me with the same sense of mystery, of a divine presence, that the sexual act gives to some and that a religious worship in a church will give to others.

Q. Let's take a scene such as the scene of intercourse on the balustrade. Do you recall that scene?

A. Yes, I do.

Q. Is that a scene in which the sex act is more important than art? . . .

A. I would say it was not more important than art, no.

Q. It was not?

A. No, the problem didn't even come up for me. I didn't even see it as a sexual act. I saw it as a parody of it at that point.

Q. The scene when the male lead took the rifle away

from the female lead and threw her to the ground, and the scene that followed, was that a scene in which the sex act was more important than art?

A. That was the moment at which I decided this might be a great picture.

THE COURT: No, the question was, in your opinion was that sex scene more important than art?

A. No, because at that moment the two came together, your Honor, in my mind. In other words, I said to myself, "This is a sexual scene of the sort I have been posing as a problem, and it is also a moment of art; the two have come together; it is a magnificent moment." And I thought it was a magnificent moment because I thought there was a deep, profound, human truth in it I had never glimpsed before, and it seemed to me it had the power of a moment that you have when you have a moment of power in great art.

MR. SCHILLING: No further questions, your Honor....

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee,

On Appeal from the Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF ANNEXED AS *AMICUS CURIAE* FOR INTERNATIONAL FILM IMPORTERS & DISTRIBUTORS OF AMERICA, INC.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 905

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellees.

On Appeal from the Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The International Film Importers and Distributors Association of America, Inc. (hereinafter referred to as IFIDA), hereby respectfully moves for leave to file a brief annexed hereto as *Amicus Curiae* in this case. Petitioners have consented to the filing of this *Amicus* brief. Respondents have refused to consent to the filing.

The IFIDA, an *Amicus Curiae* herein, is a membership corporation organized under the laws of the State of New

York in 1959. It consists of approximately 50 members comprising the vast majority of importers and independent national distributors of motion pictures from abroad.

The IFIDA has a substantial interest in the determination of the issues presented by this case. The exhibition of motion pictures has since long been held to be a form of communication to be accorded the First Amendment's protection. The ruling of the lower courts in this case are directly contrary to the interest of the IFIDA's membership in particular, and to the general viewing public as well. In our *Amicus* brief, we will consider the First Amendment issue and urge this Court to reverse the lower ruling.

It is, therefore, respectfully requested that the IFIDA be granted leave to file a brief *Amicus Curiae*.

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BRIEF—*AMICUS CURIAE* FOR INTERNATIONAL FILM IMPORTERS & DISTRIBUTORS OF AMERICA, INC.

Statement

This brief *Amicus Curiae* is submitted on behalf of the International Film Importers & Distributors of America, Inc. (hereinafter called "IFIDA"). This organization represents a vast majority of the importers and national independent distributors of films from abroad in the United States. Among its stated purposes is to promote and stimulate public interest and understanding of foreign-made motion picture films . . . to encourage the production of outstanding foreign-made motion picture films. These motion pictures represent the expressions and ideas of film makers from all over the globe. Motion pictures in general are a vital form for the communication of ideas, protected by our First Amendment's freedoms. Motion pictures from abroad have an important message for America: they tell of the customs, the cultures, the hopes and the dreams of peoples of other lands. While it is true that some of the ideas and expressions contained in these films may be contrary to the concepts of some Americans, it is the essence of democracy that they should not be suppressed, but instead reach the market place of free ideas.

The Maryland statute before this Court denies Appellant's film, and films similarly situated, this opportunity.

Argument

It is our view that Appellant herein has adequately set forth the facts in this case, as well as the issues raised thereby. We propose to urge this court to invalidate Maryland censorship law as an invalid infringement on First Amendment freedoms.

If Maryland's censorship statute were to include licensing and censorship of *any* other medium, we submit there would not be the slightest doubt, even in the court below, that such a scheme runs afoul of the letter and spirit of our Constitution. Such is the import of *Near* v. *Minnesota*, 283 U.S. 697.

In analyzing human nature, Alexander Pope once remarked:

> "To observations which ourselves we make we grow more partial for the observer's sake."

May the same not be said both as concerns censor's judgment in this case and the views the Appellee takes regarding validity of the Maryland statute? For Appellee, while citing the landmark case of *Burstyn* v. *Wilson*, 343 U.S. 495, conveniently omits a vital portion of the rule in that case:

> "Nor does it follow that motion pictures are necessarily subject to the precise rules governing of any other particular method of expression. Each method tends to present its own peculiar problems".

343 U.S. at 502-503, See Brief of Appellee, page 13.

We complete the quotation:

> "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this court, make freedom of expression the rule".

Also see *Times Film Corporation* v. *City of Chicago*, 365 U.S. 463, Brief *Amicus* of Motion Picture Association of America, at pages 18-24.

The potentially chilling effect on the dissemination of constitutionally protected motion pictures by the constant presence of a censor board, makes the continued existence of Maryland's statute a thorn in the side of our protected freedoms. We urge this Court to invalidate the statute in question on its face.

We also support Appellant's argument that the court below should have reversed the judgment on the summary authority of *Redrup* v. *New York*, 386 U.S. 767 and it is submitted, further, that the Maryland statute is an invalid denial of Appellant's rights under the equal protection clause. *Yick Wo* v. *Hopkins*, 118 U.S. 356.

IFIDA does not inspect or screen its members' films, and therefore takes no view as to the presence or absence of social values in the film "I Am Curious Yellow". Many a student of human behavior has remarked, however, that "Beauty is in the eye of the beholder". See Lew Wallace and also David Hume as quoted in "Bartlett's Familiar Quotations", 14th Edition, 729 a. and 434 b. respectively. May we not say the same as regards obscenity? One man's

obscenity is, has been and always will be another man's beauty. By case after case, following *Roth* v. *United States*, 354 U.S. 476, this Court has sought without success to define that which it regards as unprotectable by virtue of obscenity.

We submit that the search has proved unavailing. It is not just some speech, or even valuable speech, that must be protected by the First Amendment but all speech regardless of value. The adult American population should be free to choose its books, its magazines or its newspapers, its motion pictures as well as its other media, offensive or inoffensive, in its own way, without the aid of counsel of government. In the long run, this is the only effective way and as appeals to us, the only constitutional way to uphold the spirit of our First Amendment freedoms.

Consequently, we support Appellant's request to extend the rule of *Stanley* v. *Georgia*, 394 U.S. 557, to the exhibition of motion pictures in theatres, subject to the safeguards advanced in Appellant's brief, and to the extent necessary to overrule *Roth* v. *United States, supra.* We submit that the effect of censorship is no less chilling, be it covered by a licensing law or a post exhibition statute. Ultimately, no adult is forced to attend films in a motion picture theatre charging admission thereto, should he elect to stay away.

CONCLUSION

For the reasons stated above, it is respectfully urged that this Court reverse the judgment below.

Respectfully submitted,

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OCTOBER TERM, 1970

HOWARD WAGONHEIM, agent, GROVE PRESS, INC. and 5 WEST AMUSEMENT CO., INC.,

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MARYLAND STATE BOARD OF CENSORS,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS* IN SUPPORT OF THE ATTORNEY GENERAL OF MARYLAND

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

Howard Wagonheim, agent, Grove Press, Inc.
and 5 West Amusement Co., Inc.,

Appellants,

v.

Maryland State Board of Censors,

Appellee.

Appeal from the Court of Appeals of Maryland

BRIEF *AMICUS* IN SUPPORT OF THE ATTORNEY GENERAL OF MARYLAND

Preliminary Statement

Morality In Media, Inc., a membership corporation duly organized and existing under the Membership Corporation Laws of the State of New York, respectfully submits this memorandum in support of the Appellee and the Attorney General of the State of Maryland. Morality In Media, Inc. is an interfaith, charitable organization which is dedicated to initiate, promote, encourage and coordinate activities designed to safeguard and advance public morality, combat community and family deterioration which may be

effected by the dissemination of obscene materials and to support the enforcement of laws relating to the prevention and punishment of such dissemination and to promote constructive and morally uplifting publications and exhibitions in the various media, especially for the young. As *Amicus* in this action we join with and concur in the statement of Appellee. ; Rule 42, subdivision 2 of this Court has been complied with.

POINT I

The criteria for the determination of obscenity are those enumerated in the Roth decision of this Court. (*Roth* v. *United States*, 354 U. S. 476.)

Unfortunately, the standards to determine whether or not material is obscene are not clear. In many prior cases involving the question of obscenity in this Court, a minority of Justices have adopted different standards in defining obscenity (*Redrup* v. *New York*, 386 U. S. 767). Basically, all such determinations begin with the landmark decision of this Court in *Roth* v. *United States* (*supra*). In that case Mr. Justice Brennan, in delivering the opinion of the Court, stated (354 U. S. —— 489) the test as follows:

> "Whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest."

The Court also stated that the First Amendment rejected obscenity "as utterly without redeeming social importance" (354 U. S. —— 484).

This latter concept was not part of the test but a statement as to the merits of the material found "obscene" under the test enunciated in the former quotation. Other criteria have been drawn from this or added to it. The so-called "patently offensive" test is an example of one

of these accretions. This concept is often attributed to the case of *Manual Enterprises* v. *Day* (370 U. S. 478). In coining this phrase the Court (by Mr. Justice Harlan) stated (370 U. S. —— 482):

> "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' of 'decency.'".

This criterion was advanced only by a minority of the Court, but, more importantly, it is significant that the material under consideration in this case was a magazine catering to or which had appeal to homosexuals. The Court was, in this case, delving into the question of indecency by community standards. The theory of the "Roth test" or "prurient interest test" was applied to a particular type publication. It was in this context or with this emphasis in mind that the idea of "patent offensiveness" was given birth. It is submitted that the consideration here was to proscribe that type of sexual material that went beyond the community standard because it was offensive to decency; that this emphasis in Manual Enterprises (*supra*) arose because of the type of material being considered by the Court. No novel general test was added, it only became necessary to find further expression to clarify the concept advanced by Roth (*supra*). The necessity grew out of the proposition that homosexual material probably did not have an appeal to prurience to the average person, but only to a class of people, the homosexual. Since this time however, ordinances defining "obscene" by using only the community standard of prurient interest test were not objectionable as omitting the quality of patent offensiveness. If a work appeals to prurient interest of the average American judged by community standards it is patently offensive.* This rationale

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* Cf. cases collected in D.D. "Obscenity" Key 5.

also applies to the "Utterly without redeeming social value" concept as proposed by three Justices in the "Memoirs" case, see Point III *infra* (A Book named "*John Cleland's Memoirs of a Woman of Pleasure*" v. *Attorney General of the Commonwealth of Massachusetts*, 383 U. S. 413). Again, a community standard test was actually used with the emphasis on social value caused by the nature of the material under review.

> "A book cannot be proscribed unless it is found to be utterly without redeeming social value." (383 U. S. 419).

Mr. Justice Brennan wrote, in an opinion for a minority of the Court, concerning a novel written in 1750. The vehicle of expression is the determining factor in which emphasis should be placed on the basic "Roth" test. Different emphasis is necessary where homosexual magazines are reviewed; where a two-hundred year old novel is reviewed; and where a contemporary motion picture graphically depicting sexual intercourse is reviewed.

The overwhelming psychological impact of a motion picture must be considered—must be the subject of applying the proper emphasis—in determining the question of obscenity. (*Freedman* v. *Maryland*, 380 U. S. 51, 60-61; *U. S.* v. *A Motion Picture film entitled "I am Curious, Yellow"*, 404 F2 196, 198; *Landau* v. *Fording*, 245 Cal. App. a 820).

In films of contemporary origin the idea of "utterly without redeeming social value" should not be applied. Clearly, a two-hundred year old novel, where the only presentation is the printed word cannot be judged with the same emphasis as the contemporary film with graphic portrayals of moving pictures on a lighted screen accompanied by sound and dialogue. It is submitted that in judging films the "prurient interest" emphasis in the *Roth* case is truly the only consideration worthy of exami-

nation in deciding whether any film is obscene. It is also submitted that the essence of the First Amendment right to "Free Speech" is predicated on the right of an individual to exchange ideas, the right to express opinion. In cases where the ultimate aim is profit through the exploitation of sexual encounters in a film, should not this be questioned as "protected" expression? Is it not a valid question to consider the relevancy and necessity of the sexuality in relation to the communication of the idea? The only real test for obscenity is embodied in the *Roth* case.**

POINT II

Under the Roth standard the film "I am curious Yellow" is obscene.

The film "I am Curious Yellow" uses an explicit portrayal of cunnilingus, sexual intercourse and deviate sexual practices allegedly to convey a host of vague, apathetic social comments which apparently were necessary to the film especially when the central characters become too exhausted to indulge in further immediate sexual pursuits. As Mr. Justice Lumbard stated in his dissent in *United States* v. *A Motion Picture Film entitled "I am Curious Yellow"*, 404 F2 196, at page 203,

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual

** Certain Justices seemingly justify their apparent divergence from the Roth test. Whereas, in actuality, merely the emphasis required by the particular material under review would suffice. Motion pictures require such emphasis to be placed on the possible prurient impact of the medium itself and the relevancy of the sexuality to the conveyance of the idea.

scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge."

What is I am Curious Yellow—telling social commentary or the exploitation of sex for profit? Is the idea the thing or a half-hearted attempt to wrap the film in an aura of social value and mask the ultimate purpose of the film; thereby creating a continuous exploitation of explicit sexuality for profit? It is in this situation that the proper emphasis of the pure Roth rule applies. The attempt the director of the film makes toward social value is merely fitted between sexual acts, and is therefore a sham. The subject film is obviously obscene.

POINT III

The concept of social value is not *per se* a valid, independent Supreme Court test of obscenity.

In recent obscenity decisions, lower courts have been working on the theory that the *Roth* test of 1957 has been "modified" since it was originally handed down. They read the law as requiring:

(1) That the dominant theme of the material, taken as a whole, must appeal to the prurient interest in sex of the average person.

(2) That the material must be "patently offensive."

(3) That the material must be "utterly without redeeming social value."

But is this really true? The *Roth* case was the only one where a majority of the Supreme Court concurred on any test; and in that case, the Court said:

"The unconditional phrasing of the First Amendment was not intended to protect every utterance

> All ideas . . . having even the slightest redeeming social importance have the full protection of the guarantee . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire* . . . 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .'"

The Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The test (is):

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

From where, then, do these other two tests come? Supposedly the "patently offensive" test came from *Manual Enterprises v. Day*, a 1962 decision. But, what is left unsaid, is that in that case the Court could not agree upon an opinion. The "patently offensive" test is one

proposed *only* by Justice Harlan and Justice Stewart. Theoretically, the third test came from *Jacobellis* v. *Ohio*, in 1964. Again, the Court did not agree on an opinion, and this test was one proposed by Justice Brennan. Many assume that it was finally built in by *A Book* v. *Attorney General* (*Fanny Hill*) in 1966. But, here again the Court could not agree upon an opinion and this so-called test was one proposed by Justices Brennan, Warren and Fortas. Justice Clark, in a dissenting opinion in *Fanny Hill*, called the social value test "novel" and noted that only three members held to it. He said it rejects the basic holding of *Roth*.* (16 Lawyers' Ed., 2d p. 18 sequitur). Even later, in the *Redrup* case in 1967, the *per curiam* opinion cites the necessity of a three-pronged test as one held only by certain justices in the *Fanny Hill* case. It does not cite it as the test of the Supreme Court.

The only test agreed upon by the Court—is the one cited in the *Roth* decision and there you observe, the Court —speaking clearly—tells us that once applying its test and determining that an utterance is obscene, there is no consideration of social importance since obscenity is of such "slight social value as a step to truth, that any benefit to be derived is clearly outweighed by the social interest in order and *morality*." Obviously, under the *Roth* case the charge to a jury is the prurient interest test. There is nothing in the prurient interest test that requires a finding of "utterly without redeeming social value". Under the Roth rule "utterly without redeeming social value" would not be considered by the jury and therefore, cannot be considered since the *Roth* case is the only precedent we have.

The majority opinion of Judge Hays and Judge Friendly concurring in "A Motion Picture Entitled 'I am Curious

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* Justice White also agreed with Justice Clark that the "utterly without redeeming social value" concept contradicted the *Roth* case (at p. 461).

Yellow' " (404 F2 196) only adds confusion to an area of Constitutional Law that has already been severely criticised. If one follows the theory advanced by Justice Friendly one finds that he joins with Chief Judge Lumbard in holding that the governing rule in Roth was satisfied; that the film violates the "prurient interest" test. However, Judge Friendly gives more credence to the "Memoirs" utterly without redeeming social value—so called test. In effect, this means that a majority opinion of the United States Supreme Court, which has never been overruled, yields to a minority opinion of three Justices. See Judge Barnes concurring opinion in the instant case currently reviewed.

See also decision by Judge Paul LaPrade, Superior Court, State of Arizona, Maricopa County. Rendered Dec. 8, 1969, and decision by Judge Joseph Tauro, Suffolk County Superior Court, Commonwealth of Mass. rendered Nov. 12, 1969.***

POINT IV

The failure of the United States to appeal from the reversal of the lower court's determination that the film "I am Curious Yellow" was obscene, should not preclude a State Court or the United States Supreme Court from considering the question of the film's obscenity. (*United States* v. *A Motion Picture Film Entitled "I am Curious Yellow"*, 404 F2 196), 2nd Circuit 1968.

The record of the District Court is quite clear. It was the judgment of the jury, after proper instruction by Judge Murphy, that the film, presently being considered, was obscene. The 2-1 decision to reverse, on appeal, the jury's

*** Both cases concerned the film "I Am Curious Yellow", and both judges stated that utterly without redeeming social value is not a Supreme Court test of obscenity.

determination did not close the question of the film's possible obscenity. The United States had every right to take an appeal from this decision. The fact that it did not exercise that procedural right did not forever foreclose any future consideration of whether or not this film was obscene. This election of the United States not to take an appeal in no way mitigates against a state Court or superior federal court making its own determination on the merits of the film's obscenity.

On the contrary, if this case in the Second Circuit of the United States Court of Appeals has merit, or relevancy to the matter before the Court the vigorous dissent by Chief Judge Lumbard should be carefully considered.

POINT V

The verdict of the jury which has, under proper instructions, found that a film is obscene under the standards established by the United States Supreme Court, should not be disturbed.

Notwithstanding that there has been no jury trial in the present matter before this Court, it should be noted that a jury trial did, in fact, take place in the United States District Court for the Southern District of New York, concerning this particular film. That it was the verdict of the jury, under proper instructions from Judge Murphy, that the film "I Am Curious Yellow" was obscene. On appeal, this decision was reversed; however, in a strong dissenting opinion Chief Judge Lumbard said, at page 203:

> "All are agreed that Judge Murphy's charge correctly stated the law and instructed the jury. Indeed, Counsel for the Appellant took no exception whatever to the charge. I see no good reason why that jury verdict should be disturbed."

It is also noteworthy that Judge Lumbard observes later on, at page 204:

> "The action of the majority in nullifying the findings of the jury here goes beyond any case thus far decided in the obscenity area. No case is cited and I can find no case where the Supreme Court has set aside the verdict of a jury which has, under proper instructions, found present the three elements of obscenity as established by Roth v. United States. . . .". "There is no reason to suspect that judges are in any better position to pass judgment on these matters than are jurors."

See also Judge Lumbard's quotation of Mr. Justice Brennan's remarks in *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436, 448, 77 S. Ct. 1325, 1331, 1 L. Ed. 2nd 1469 (dissenting opinion) and Chief Justice Warren's dissenting opinion in *Jacobellis* v. *Ohio*, 378 U. S. at 199, 84 S. Ct. at 1686, to the same effect. While the instant case is not a jury case, a jury has reviewed this film, after proper charge, in a prosecution wherein the defendant was afforded due process. This jury determination shows clearly that the subject film goes beyond contemporary community standards in its presentation of sexual scenes. (An expression on this point by the Court at this time would revitalize confidence in our jury system and quiet critics of Court's handling of jury determinations in obscenity cases.)

POINT VI

The exhibiting of a motion picture in a theater open to the public is inimical to the theory of permissible private possession.

The recent case of *Stanley* v. *Georgia* (394 U. S. 557), recognized that the mere private possession of obscene material, in one's own home, is not a crime *per se* (at p. 568). The very essence of this decision is an individual's

right to privacy and should not be abrogated since it is guaranteed by the Fourth Amendment to the Constitution. No stretch of the imagination will support the theory that this private constitutional right should be extended to a public motion picture theater. The rational of the *Stanley* case is not grounded in licensing obscenity but in giving protection to the individual's right to be master over his own soul and to exercise his free will inside his own home. No further application of the holding in the *Stanley* case was ever intended.

Conclusion

It is time that the United States Supreme Court reiterated the Roth test and makes it clear that the concept of utterly without redeeming social value is not and was never a part of that test; and we urge this be done.

This will enable the legislatures to redefine obscenity in those states which have added the erroneous social value so called test.

The power of a State and the Federal Government to regulate conduct has been universally recognized as a mandate of the people. The election by the governed to be governed is inherent in our nation since its formation and is inalienable. Trial by jury has been an integral part of that government by the people. To suppose there is some super power greater than this, which mandates that the people have some lesser right, as in the area of publishing and exhibiting materials which could be considered obscene, is sheer folly. It follows that no private enterprise should receive more consideration than the individual or collective rights of the people. Notwithstanding the fact that the private enterprise is involved in exhibiting a motion picture and this form of expression has been attempted to be equated with our First Amendment rights, does this transcend the inalienable rights of the people?

This separate, private entity, whether it be Grove Press, Inc. or any other business does not have the right to foist its wares on the people under the guise that this is their right of freedom of expression.

The concept of freedom of expression is vastly different, and should not be equated with the exploitation or sale of sex for profit. Such exploitation or sale is not one of the reasons that freedom of speech has been guaranteed under the First Amendment. The purposes of that guarantee is that no transmission of ideas would or could be stifled. That expressions, even those critical of our government, would not be proscribed, for that was the very manner in which our government found its formation. That this concept is healthy and should persevere if our form of government is to be vibrant in its existence.

The sale of sex for profit has nothing to do with the free transmission of idea or the open discussion of political affairs and should not be afforded this First Amendment privilege.*

The State has the power, and exercises it through its laws mandated by the people, to regulate public displays of sexual activity or conduct. Consequently, it is reasonable to assume that the State has the right to regulate the sale or exposition of sex for profit. This indulgence of using a freedom as a license for monetary gain should bring it outside the pale of the First Amendment protection.

If our constitutional privileges are to continue to be meaningful and remain beyond repression, they should be carefully delineated from the unscrupulous who would use them for financial purposes. There is no question that the decision of this Court should turn on the principle

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* The real purposes of the First Amendment can only be degraded by the inclusion of a film like I Am Curious Yellow within the First Amendment's protection.

that the private interest should surrender to the public good.

For the foregoing reasons, the judgment of the Court below should be affirmed and the Motion Picture "I Am Curious Yellow" should be declared obscene.

Respectfully submitted,

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MOTION FILED

JUL 20 1970

IN THE

Supreme Court of the United States

October Term, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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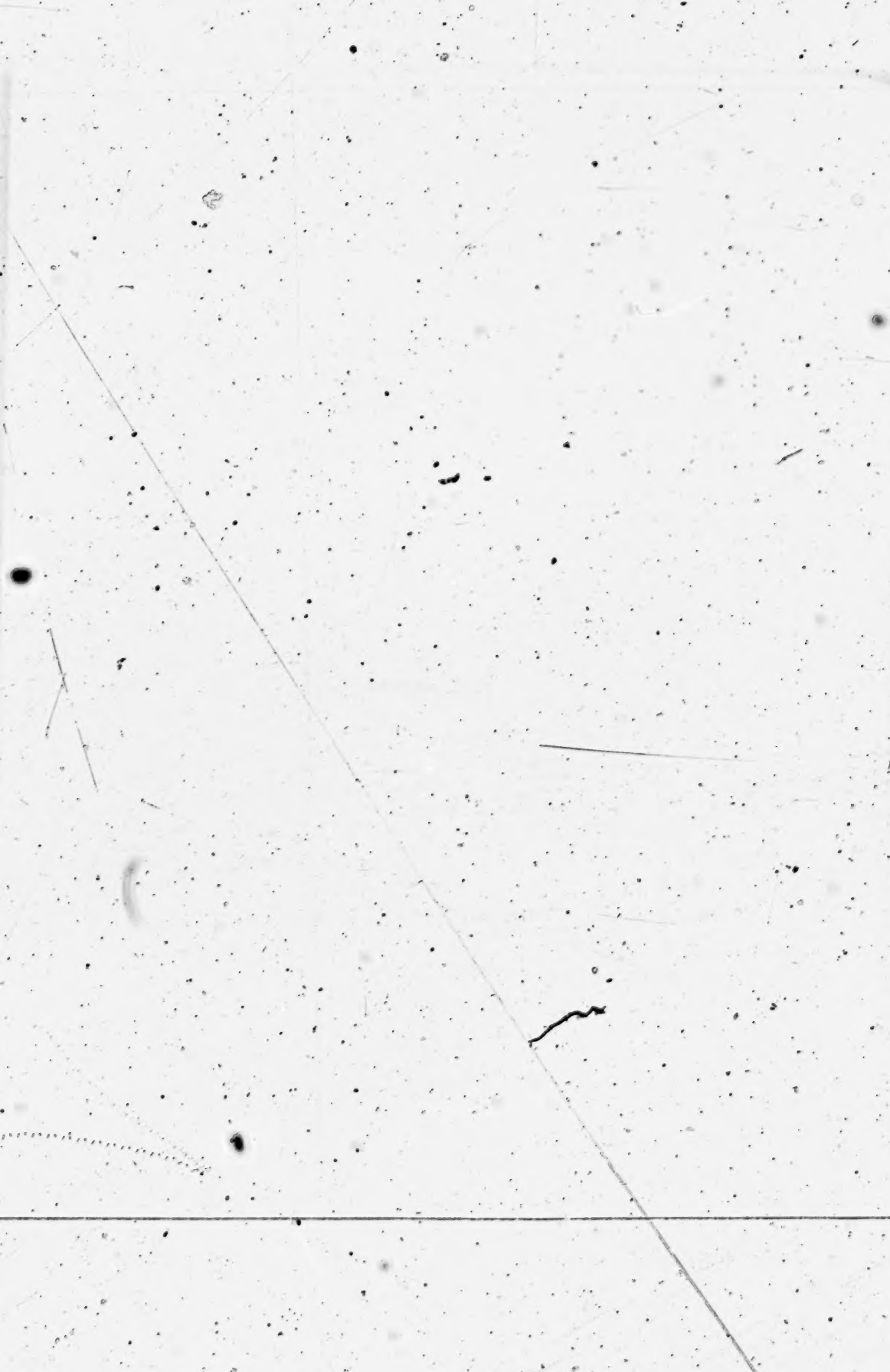

IN THE

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October Term, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Motion Picture Association of America, Inc., hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorneys for the Appellants has been obtained. On June 26, 1970, movant wrote the attorney for the Appellee. A copy of that letter and the reply is appended below.

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures in the United States, to wit:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corporation

Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros., Inc.

MPAA takes no position on the merits of the specific controversy involving the attempt to exhibit "I Am Curious —Yellow" in the State of Maryland. It believes that the merits of that specific controversy will be adequately briefed and argued by the parties.

However, Appellants' Jurisdictional Statement and Appellee's Motion to Dismiss or Affirm have raised two additional questions of more general significance to the entire motion picture industry. These are: (1) the continued constitutional validity of permitting motion pictures, unlike any other medium of expression, to be subjected to prior restraint, and (2) the appropriate constitutional standard by which the obscenity of motion pictures is to be judged. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

Because MPAA believes that the general issues raised in this case are of vital concern to the entire motion picture industry, including its member companies, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

LOUIS NIZER
Attorney for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
JAMES BOURAS
of Counsel

APPENDIX A

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
522 Fifth Avenue
New York, N. Y. 10036

June 26, 1970

Mr. Thomas N. Biddison, Jr.
Assistant Attorney General
of Maryland
1200 One Charles Center.
Baltimore, Maryland 21201

Re: Grove Press, Inc. v. Maryland State Board
of Censors (Supreme Court 905).

Dear Mr. Biddison:

The Motion Picture Association is a trade association representing the major producers and distributors of motion pictures. Its members include:

Allied Artists Pictures Corp.
Avco-Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corp.
Twentieth Century-Fox Film Corp.
United Artists Corp.
Universal Pictures

Because of the interest of the members of the Association in the constitutionality of the Maryland Statute establishing the Maryland Board of Censors, the Motion Picture Association is desirous of filing a brief amicus curiae in support of appellants Grove Press, Inc. et al. in the action now pending before the Supreme Court, Grove Press, Inc. v. Maryland State Board of Censors (905).

Appendix A

May we have your consent on behalf of the Maryland State Board of Censors to the filing by the Motion Picture Association of a brief amicus curiae?

With best wishes,

Sincerely yours,

Barbara Scott
BARBARA SCOTT
Deputy Attorney

BS:wc

Appendix A

THE ATTORNEY GENERAL
1200 One Charles Center
Baltimore, Md. 21201

July 7, 1970

M's Barbara Scott
Deputy Attorney
Motion Picture Association of America, Inc.
522 Fifth Avenue
New York, N. Y. 10036

Re: Grove Press, Inc. v. Maryland State Board of Censors (Supreme Court 905)

Dear M's Scott:

I am sorry we are unable to grant our consent to your filing an amicus curiae brief in the above captioned matter.

Very truly yours,

Thomas N. Biddison, Jr.
THOMAS N. BIDDISON, JR.
Assistant Attorney General

TNB:k

IN THE

Supreme Court of the United States

October Term, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellees.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to File this brief, *supra.*

ARGUMENT

I.

There is no longer any valid constitutional basis upon which to permit motion pictures, unlike any other medium of expression, to be subjected to prior restraint.

Motion pictures are currently the only medium of communication which this Court has permitted to be subjected to prior restraint.[1] The premise upon which this differ-

[1] Prior restraints have been forbidden with respect to newspapers (*Near* v. *Minnesota*, 283 U.S. 697), magazines (*Hannegan* v. *Esquire, Inc.*, 327 U.S. 146), books (*Bantam Books* v. *Sullivan*,

entiation of treatment between motion pictures and other media has been based is by no means clear. In the three previous cases in which this issue was before this Court, the Court has only indicated that there is a "difference". For instance, in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952), this Court held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." Nevertheless, the Court added that ". . . it [does not] follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." *Id.* at 502-503.

In *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961), again without any adequate articulation of the reason or reasons why motion pictures should be regarded as "different," the Court held that a requirement that films be submitted for approval in advance of their public exhibition was not unconstitutional *per se*.

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Court held that a system requiring administrative review and approval of films prior to their public exhibition would be valid only if it included certain procedural safeguards. However, the Court reiterated its previously expressed view that prior restraint of motion pictures was not unconstitutional *per se* because ". . . films differ from other forms of expression." *Id.* at 61.

None of these opinions, however, contains any indication of the way or ways in which motion pictures

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372 U.S. 558), handbills (*Lovell* v. *Griffin*, 303 U.S. 444; *Talley* v. *California*, 362 U.S. 60; *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296), the spoken word (*Saia* v. *New York*, 334 U.S. 558; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290, 294, 295), and broadcasting (*Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 3rd Cir. 1950, cert. den. 340 U.S. 929; c.f. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969)).

"differ" from other media of expression, why these differences are of constitutional significance, the precise way in which they are relevant in determining constitutionally permissible methods of community control, and the reasons why they justify subjecting motion pictures to prior restraint while no other form of expression is subject to such control.

While motion pictures in their infancy may have been regarded by the courts and public alike as "a business pure and simple," *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U.S. 230, 244 (1915), this is most assuredly no longer true. Motion pictures today enjoy a status equivalent to that of literature and are being studied and written about critically to a greater extent than ever before. Most major universities in the United States today offer courses in film appreciation and film technique.[2] To say that they have become *the* art form of our time, as many have already said,[3] is

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[2] The American Film Institute's Guide to College Film Courses 1969-70 shows that 219 institutions of higher learning now offer courses in film, representing an 84 percent increase during the past five years. Fifty-one of these institutions offer not just courses, but also degrees in film.

[3] See *MD* (September, 1966, page 160) for the assertion that "Cinema is the only major art form developed in the 20th century, and in many ways it is the most characteristic art of the age." See also, e.g., Stanley Kauffmann, "A World on Film" (New York: Harper & Row, 1966), pages 415-428. The late renowned art critic Erwin Panofsky wrote: "Film art is the only art the development of which men now living have witnessed from the very beginnings." And "it might be said that a film, called into being by a cooperative effort in which all contributions have the same degree of permanence, is the nearest modern equivalent of a mediaeval cathedral: the role of the producer corresponding, more or less, to that of the bishop or archbishop; that of the director to that of the architect-in-chief; that of the scenario writers to that of the scholastic advisers establishing the iconographical program; and that of the actors, camera men, cutters, sound men, make-up men and the divers technicians to that of those whose work provided the physical entity of the finished product, from the sculptors, glass painters, bronze casters, carpenters and skilled masons down to the quarry men and woodsmen." *Critique*, Vol. 1, No. 3; January-February, 1947.

not to overstate the case. To say that the scope of their constitutional protection must continue to be governed by public and judicial attitudes which might have been prevalent 20 or 30 years ago is to preclude any constitutional development, a course which this Court refused to follow in *Joseph Burstyn, Inc. v. Wilson, supra,* and which it should refuse to follow now.

In short, we believe that whatever justifications *might* have existed in the past, there is no longer any valid constitutional basis for permitting prior restraint insofar as motion pictures are concerned while at the same time not permitting prior restraint of any other medium of expression.[4]

Maryland is today the only state in the United States which retains a formal board of censors to which all films must be submitted for review, approval and licensing prior to their public exhibition.[5] Following this Court's decision

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[4] If the justification is premised on the Court's concept of the differences in marketing, availability, etc., of motion pictures as opposed to other media, these considerations will be dealt with *infra,* pp. 14-16.

[5] Since 1965, censorship laws in the states of New York, Virginia and Kansas and the cities of Chicago and Memphis have all been declared unconstitutional and have not been re-enacted in amended form. *In the Matter of Trans-Lux Distributing Corp. v. Board of Regents of the University of the State of New York,* 16 N.Y.2d 710, 261 N.Y.S.2d 903, 209 N.E.2d 558 (1965); *Victoria Films, Inc. v. Division of Motion Picture Censorship,* Circuit Court of the City of Richmond, Virginia, Case No. B-2907 (letter opinion of Judge John Wingo Knowles dated April 15, 1965) (not officially reported); *State of Kansas v. Columbia Pictures Corp.,* 197 Kan. 448, 417 P.2d 255 (1966); *Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968) (per curiam); *Embassy Pictures Corp. v. Hudson,* 242 F.Supp. 975 (W.D. Tenn. 1965). See also: *Trans-Lux Distributing Corp. v. Regents,* 380 U.S. 259 (1965) (per curiam).

A semblance of board-type censorship continues to exist in the City of Detroit, where the Detroit License and Censor Bureau, a division of the City's Police Department, screens and licenses films

in *Freedman* v. *Maryland, supra,* the Maryland censorship statute was amended in an attempt to comply therewith. Since that time, eight film censorship cases have reached the Court of Appeals of Maryland. The censors have lost five of these cases,[6] and have won three,[7] including their present attempt to prevent the exhibition of "I Am Curious —Yellow."[8]

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prior to their public exhibition. Screenings are held before policemen, who sometmes license films for exhibition only at certain theatres.

In addition, the City of Milwaukee maintains a citizens' Motion Pictures Commission, with whose recommendations local exhibitors in most cases comply. However, there is no sanction for failure to observe a recommendation by the Commission.

Finally, the City of Providence licenses theatres on a weekly basis through its Bureau of Licenses, with the grant or refusal of the license being based on the film which is to be shown during the week for which the license is sought. If the members of the Bureau find probable cause to believe that a particular film is obscene, they must go to court to seek an injunction against its exhibition.

[6] *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors,* 240 Md. 98, 213 A.2d 235 (1965) ("A Stranger Knocks"); *Dunn* v. *Maryland State Board of Censors,* 240 Md. 249, 213 A.2d 751 (1965) ("Lorna"); *Hewitt* v. *Maryland State Board of Censors,* 241 Md. 283, 216 A.2d 557 (1966) ("This Picture is Censored"); *Leighton* v. *Maryland State Board of Censors,* 242 Md. 705, 218 A.2d 179 (1966) ("The Dirty Girls"); *Hewitt* v. *Maryland State Board of Censors,* 243 Md. 574, 221 A.2d 894 (1966) ("This Picture is Censored") (second case involving this film).

[7] *Sanza* v. *Maryland State Board of Censors,* 245 Md. 319, 226 A.2d 317 (1967) ("peep show" films); *Hewitt* v. *Maryland State Board of Censors,* 254 Md. 179, 254 A.2d 203 (1969) ("Odd Tastes"); *Wagonheim* v. *Maryland State Board of Censors,* 255 Md. 297, 258 A.2d 240 (1969) ("I Am Curious—Yellow").

[8] However, the Maryland State Board of Censors has licensed for exhibition "Yellow's" parallel film, "I Am Curious—Blue." *Motion Picture Daily,* July 6, 1970, page 1, column 1.

In its fiscal year 1969, the Maryland State Board of Censors reviewed a total of 687 motion pictures, of which it cut 14 and rejected 59. (*Time Magazine*, March 9, 1970, page 20, columns 1-3.) Half of those rejected were 8-mm. films (*Ibid.*), presumably of the type found to be obscene in *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967), which are not shown in regular commercial motion picture theatres. It is impossible to determine whether court proceedings were commenced and the 59 pictures rejected outright were actually adjudicated to be obscene, as required by *Freedman* v. *Maryland*, *supra*, and Section 19 of the censorship statute, or whether the persons submitting some or all of the 59 pictures rejected indicated that they would acquiesce in the Board's decisions and did not wish to go to court.

Neverthless, despite the fact that the Maryland State Board of Censors rejected less than five percent of the *theatrical* films submitted to it during fiscal 1969, Maryland continues to require that *all* films be submitted for review and approval prior to their public exhibition. In effect, the requirement that *all* films be submitted for review and approval indicates a presumption that *all* films are suspect, a presumption which is both "irrational" and "arbitrary." *Leary* v. *United States*, 395 U.S. 6, 36 (1969); *Morrison* v. *Wilson*, 307 F.Supp. 196, 198-199 (N.D.Fla. 1969). Moreover, it is extremely doubtful that any kind of restrictive presumption is constitutionally permissible in the First Amendment area. *Speiser* v. *Randall*, 357 U.S. 513, 523-524 (1958); *Ginsberg* v. *New York*, 390 U.S. 629, 631 n.1 (1968). Be that as it may, in view of the limited number of motion pictures which the Board has banned entirely and presumably will be able to ban in the future, there can no longer be any constitutional justification for a statute requiring the submission of *all* films for review and approval prior to their public exhibition. "I Am Curious—Yellow" may present one exceptional case, but to require the latest film from Walt Disney Productions to be subjected to the same advance scrutiny is plainly ridiculous.

Even the system of classification by prior review which was before this Court in *Interstate Circuit* v. *Dallas*, 390 U.S. 676 (1968), did not require the submission of *all* films for review and classification prior to exhibition. Under the ordinance involved in the *Interstate* case, only those films about the propriety of whose classification the Dallas Motion Picture Classification Board had some question were screened by the Board.[9]

We recognize the State of Maryland's legitimate interest in preventing the exhibition of obscene films. *Roth* v. *United States*, 354 U.S. 476 (1957). However, we believe that legitimate interest can adequately be served by compelling the state to resort to the ordinary criminal process or to a declaratory-injunctive process similar to that approved by this Court in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). Unlike the current Maryland film censorship statute, both of these alternative processes are designed to focus attention on the specific material alleged to be obscene and do not impede, even temporarily, the free distribution of material about whose lack of obscenity there can be no question.

Recent decisions clearly indicate that, even where the ordinary criminal process or a declaratory-injunctive remedy is employed, the free distribution of specific material alleged to be obscene cannot be impeded unless there has first been a convincing showing in an adversary hearing that there is at least probable cause to believe that the material is obscene. See, e.g., *Tyrone, Inc.* v. *Wilkinson*, 294 F.Supp. 1330 (E.D.Va. 1969), aff'd, 410 F.2d 639

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[9] Systems of classification by prior review similar to that involved in the *Interstate* case are now in effect in the State of Rhode Island and the City of Dallas.

In addition, the City of Chicago maintains a classification system under which all films intended for exhibition to persons under the age of 18 years must be submitted for review and approval. If a particular film is intended for exhibition to adults only, it need not be submitted.

(4th Cir. 1969), cert. denied, 396 U.S. 985 (1969); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970); *Veryari* v. *208 Cinema, Inc.*, cert. denied, 397 U.S. 934 (1970); *Fontaine* v. *Dial*, 303 F.Supp. 436 (W.D.Tex. 1969), appeal dismissed for want of jurisdiction, — U.S. — (1970); *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F.Supp. 662 (E.D. La. 1969), probable jurisdiction noted on other questions *sub nom. Perez* v. *Ledesma*, — U.S. — (1970); *Gundlach* v. *Rauhauser*, 304 F.Supp. 962 (M.D.Pa. 1969) (per curiam); *Entertainment Ventures, Inc.* v. *Brewer*, 306 F.Supp. 802 (M.D.Ala. 1969); *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970); *Cambist Films, Inc.*, v. *Duggan*, 420 F.2d 687 (3d Cir. 1969); and countless other decisions, both reported and unreported, to the same effect.

By contrast, the Maryland film censorship statute indulges by implication the opposite assumption: a film's distribution is impeded and it cannot be exhibited unless and until it has first been determined not to be obscene. In view of the availability of alternative, equally effective methods of regulation which are much more sensitive to First Amendment freedoms, it is clear that the Maryland film censorship statute cannot stand. As this Court observed in *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960):

> "... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

In holding Maryland's previous censorship law unconstitutional, this Court noted that any revised statute would be valid only if it were drafted "to avoid the potentially chilling effect" of the statute held unconstitutional. *Freedman* v. *Maryland*, *supra* at 61. The Court premised its discussion of possibly valid procedures upon the assump-

tion that "films are scheduled well before actual exhibition," that they could be submitted for review and approval well in advance of their scheduled exhibition, and that any litigation would be completed before the scheduled opening date so that "the most propitious opportunity for exhibition" would not be lost. *Ibid.* The Court's assumptions, unfortunately, were not altogether correct; they are in accord neither with the actual nature of contemporary motion picture distribution nor with the experience of distributors in dealing with the post-*Freedman* Maryland State Board of Censors. The production cost of a contemporary motion picture may be as high as $20 million. In order to secure an adequate return on his investment, and to avoid unnecessary interest expenses, a distributor must complete and release his picture as quickly and extensively as possible. This release is almost always preceded by extensive publicity of national scope, which only adds to the picture's cost. Therefore, even assuming that "films are scheduled well before actual exhibition," which is not always true, this does not mean that the film has been completed or that a print thereof is available for submission to the Maryland State Board of Censors. In fact, prints may not be available for submission to the Board of Censors until a few days before scheduled opening dates in Maryland, particularly in the City of Baltimore. To the extent that the Board of Censors interposes any objections to the film under submission or portions thereof, the distributor in most cases has no choice but to accede to the Board's demands or else lose "the most propitious opportunity for exhibition." In one post-*Freedman* case, for example, final judicial vindication of a film which the Board of Censors sought to ban took almost 10 months. *Hewitt* v. *Maryland State Board of Censors*, 241 Md. 283, 216 A.2d 557 (1966), 243 Md. 574, 221 A.2d 894 (1966). MPAA has been informed by its member companies that in at least three recent instances—involving "ZABRISKIE POINT" (M-G-M), "THE ADVEN-

TUBERS" (Paramount) and "BEYOND THE VALLEY OF THE DOLLS" (20th Century-Fox) — films have been cut to satisfy the Board of Censors rather than encounter the delays which would necessarily attend litigation, delays which would have lost "the most propitious opportunity for exhibition." For even though litigation may theoretically delay a film's opening by only a few days, it must be remembered that the exhibitor who had intended to show the film will in the interim have replaced it with another film which may play in his theatre for weeks or even months. We believe that the "chilling effect" which this Court found to be a vice of the previous Maryland statute continues unabated under the present film censorship law.[10]

Finally, it must be recognized that in its recent decisions this Court has de-emphasized judgment of obscenity *vel non* and has instead approached the question of obscenity in terms of the persons to whom allegedly obscene material is exhibited or sold, the possible obtrusiveness of its presentation, the manner in which it is advertised or promoted, and the intent with which it is possessed. See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam), and the numerous *per curiam* judgments based thereon; *Stanley v. Georgia*, 394 U.S. 557 (1969). The dominant constitutional philosophy would seem to be that states should direct their attention to the use to which allegedly obscene material is put, not to the material itself. In view of this, the State of Maryland would seem to have no exigent interest in maintaining a Board of Censors whose sole function is to examine in advance every film intended for exhibition within its jurisdiction to detect those few films which may be obscene for all purposes. See *United*

[10] Actually, except for the addition of Section 19, the present law is the same as the law involved in the *Freedman* case.

States v. *127,295 Copies of Magazines*, 295 F.Supp. 1186 (D. Md. 1968) (per curiam); *United States* v. *4,400 Copies of Magazines*, 276 F.Supp. 902 (D. Md. 1967). To the extent that the State of Maryland has a constitutionally legitimate interest in preventing the exhibition of certain films under any circumstances, that interest can more than adequately be served by means which avoid the "chilling effect" of the current motion picture censorship law and which are much more sensitive to First Amendment freedoms. Certainly, there has been no allegation that reliance on the ordinary criminal process has in any way thwarted the state's attempts to prevent the circulation of obscenity in other media, nor could there be.[11]

In short, we believe that upon "pragmatic assessment of its operation in the particular circumstances" *Kingsley Books, Inc. v. Brown*, *supra* at p. 442, there is no longer, if there ever was, a constitutionally valid basis upon which this Court can justify Maryland's system of prior restraint of motion pictures by an administrative licensing board. Boards of censors such as that maintained today only by the State of Maryland have become an anachronism, both historically and constitutionally. This Court should so hold.

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[11] See, e.g., *Levin* v. *State*, 246 Md. 139, 228 A.2d 487 (1967), cert. denied, 389 U.S. 1048 (1968); *Donnenberg* v. *State*, 232 A.2d 264 (Md. Ct. App. 1967); *Lancaster* v. *State*, 256 A.2d 716 (Md. Ct. App. 1969).

II.

The obscenity of motion pictures must be governed by the same standards which govern obscenity in any other medium of expression.

In its Motion to Dismiss or Affirm, the Maryland State Board of Censors advances the somewhat novel argument that the obscenity of motion pictures should be governed by standards different from those which govern other media of expression.

The Board of Censors purports to find support for its argument in certain previous decisions of this Court. However, as those decisions themselves make clear, the passages in question dealt solely with the constitutional justification for subjecting motion pictures to different *methods* of control. As we have argued above (Point I, *supra*), we believe there is no longer any valid constitutional basis for permitting motion pictures, unlike any other medium of expression, to be subjected to prior restraint. Nevertheless, even if this Court persists in finding a valid constitutional basis for differentiation of motion pictures insofar as *methods* of control are concerned, there is nothing in its previous decisions which suggests that the *substantive* standards under which the obscenity of motion pictures is to be judged may be different from those applicable to other media.

Insofar as the individual members of this Court have subscribed to particular tests of obscenity, they have always viewed them as being equally applicable to all media of expression, including motion pictures. See, e.g., *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957) (per curiam) ("The Game of Love"); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) ("The Lovers"); *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per

curiam) (various films); *I. M. Amusement Corp.* v. *Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's Models"); *Robert-Arthur Management Corp.* v. *Tennessee*, 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain* v. *Kentucky*, 397 U.S. 319 (1970) (per curiam) ("I, A Woman").[12]

The constitutional test of obscenity adopted and relied upon by almost all state and lower federal courts is that enunciated in the opinion of Mr. Justice Brennan in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418-419 (1966):

> "... three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
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> • • •
>
> "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."

This is the test which has been adopted by the Maryland Court of Appeals in obscenity cases, including motion picture cases. See, e.g., *Hewitt* v. *Maryland State Board of Censors*, 254 Md. 179, 254 A.2d 203 (1969). It clearly includes the requirement that films must be "utterly without redeeming social value" before they may be adjudged obscene. *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 104-105, 213 A.2d 235, 238-239 (1965). To the extent that a current majority of

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[12] In *Grove Press, Inc.* v. *Gerstein*, 378 U.S. 577 (1964), the Court, *per curiam*, decided that the Henry Miller novel "Tropic of Cancer" was not obscene on the basis of the decision that same day in *Jacobellis*, in which the Court decided the motion picture "The Lovers" was not obscene. The several Justices concurring and dissenting referred to their respective decisions in *Jacobellis*.

this Court might permit states greater latitude in finding certain material to be obscene, it is nevertheless clear that the Maryland Court of Appeals has remained within constitutional bounds in adopting and following the tripartite *Memoirs* formulation, that it was free to do so, and that its choice should not be disturbed by this Court.[13] See *Mishkin* v. *New York*, 383 U.S. 502, 507-508 (1966). In effect, what the Maryland State Board of Censors has asked this Court to do is to supersede the constitutionally-permissible test of obscenity adopted by the Maryland Court of Appeals, something which this Court has clearly indicated it will not do. *Ibid.*

In support of its argument that the constitutional standard governing the obscenity of motion pictures should be different from that governing other media, the Board of Censors cites *Landau* v. *Fording*, 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), judgment affirmed, 388 U.S. 456 (1967) (per curiam).[14] A reading of the lower court opinion in that case, however, clearly shows that, in finding the film in question ("Un Chant d'Amour") to be obscene, the court applied the tripartite *Memoirs* formulation. 245 Cal. App. 2d at 823-824. The court most emphatically did *not* hold that the constitutional guaranty was any different in the case of motion pictures, or that a different constitutional test of obscenity should be applied to motion pictures. Although the court intimated its view that, *under the same constitutional test*, "sexual scenes [in a motion picture] may transcend the bounds of the constitutional guaranty

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[13] This is not to imply any view as to whether the *Memoirs* formulation was correctly applied by the Maryland Court of Appeals to "I Am Curious—Yellow."

[14] Since this Court wrote no opinion in *Landau* it is impossible to determine whether its judgment of affirmance was based on a finding of obscenity *vel non* or whether the presence of pandering, as indicated in the opinion of the California Court of Appeals, rendered a film not otherwise obscene, obscene.

long before a frank description of the same scenes in the written word" (*Id.* at 827), this is not to say that the constitutional test itself is different or that it should be.

Similarly, in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow"*, 404 F.2d 196 (2d Cir. 1968), it is clear that all three judges (including the dissenter) applied the tripartite *Memoirs* formulation. Again, although each judge intimated that a visual representation of sexual scenes may reach the threshold of obscenity more quickly than a written description of the same scenes (*Id.* at 198-199, 201, 203), the Government's argument that the constitutional test of obscenity itself should be different in the case of motion pictures was clearly regarded as an unwarranted "doctrinal innovation." *Id.* at 201.

Finally, in *P.B.I.C., Inc.* v. *Byrne*, — F.Supp. — (D. Mass. 1970), stay denied by an equally divided Court (4-4), — U.S. — (1970), it is recognized by both the majority and dissenting judges that the same constitutional test of obscenity, the tripartite *Memoirs* formulation, governs obscenity in all media of expression. (See particularly pages 11-13 of the typed majority opinion and pages 2-3 of the typed dissenting opinion.) In an opinion for himself and District Judge Bownes, Circuit Judge Coffin observed that:

> "... the enunciation of a different standard for every conceivable medium would only compound the confusion without ameliorating the delicacy of the basic judgments required by any standard." (Page 13 of typed majority opinion.)

We agree with Circuit Judge Coffin that any departure from a single standard governing obscenity in all media of expression "would only compound the confusion" which already exists in all areas of obscenity litigation. The argument by the Maryland State Board of Censors that a different constitutional test of obscenity should govern motion pictures, as opposed to other media, should be rejected by this Court.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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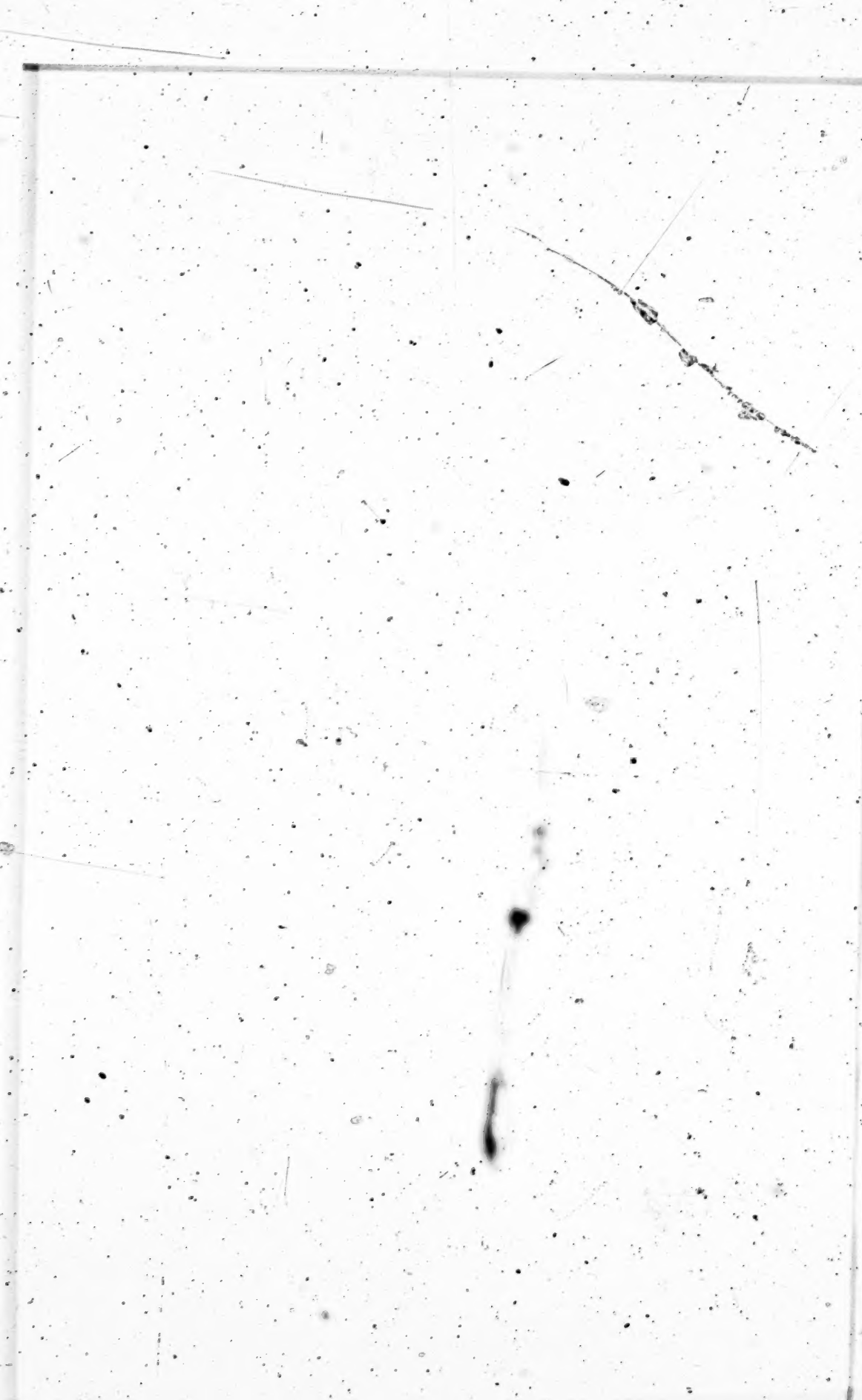

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

OPINION BELOW

The opinions of the Court of Appeals of Maryland (App. 6-42) are reported at 258 A.2d 240.

JURISDICTION

The opinions of the Court of Appeals of Maryland were entered on October 22, 1969. Notice of Appeal to this Court was filed on November 5, 1969. The Jurisdictional Statement was filed on December 3, 1969. Probable jurisdiction was noted on March 23, 1970. The jurisdiction of this Court rests upon 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether Maryland's motion picture censorship statute (Md. Code Ann., Art. 66A) has been applied in this case to prevent the exhibition of a film ("I Am Curious (Yellow)") which is protected from interference under the First and Fourteenth Amendments' guarantees of freedom of expression.

2. Whether the system of prior restraint imposed on the exhibition of motion pictures by the Maryland censorship statute, on its face or as applied, exceeds constitutional limits.

3. Whether the First and Fourteenth Amendments prohibit multiple State and local obscenity proceedings against a work adjudged by a federal court as a matter of constitutional law to be non-obscene and constitutionally protected in an action binding on the United States.

4. Whether application of the Maryland censorship statute to the exhibition of a film in a privately owned theatre for the benefit of adults who pay admission and voluntarily choose to view the film violates the First and Fourteenth Amendments under the constitutional principles applied in *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

5. Whether the procedures followed in this case by the Maryland State Board of Censors and by the courts below failed to meet constitutional standards.

STATUTE INVOLVED

The Maryland motion picture statute, Md. Code Ann., Art. 66A (1964 ed. and 1969 Supp.), is set out in full in Appendix J of the Jurisdictional Statement at pp. 91a-102a.

STATEMENT

The motion picture "I Am Curious (Yellow)" was imported from Sweden on December 30, 1967, for distribution and exhibition throughout the United States. Shortly after arrival at Kennedy International Airport in New York, it was seized by officials of the United States Bureau of Customs and forfeiture proceedings were instituted by the federal government in the United States District Court for the Southern District of New York. The action was defended by appellant Grove Press, Inc. (hereinafter "Grove"), the importer and owner of the United States distribution rights in the film. After a jury trial, the District Court entered a judgment finding the film obscene, but upon appeal to the United States Court of Appeals for the Second Circuit, this judgment was reversed, and on November 28, 1968, eleven months after importation, a final order was entered, requiring the release of the film for distribution. *United States* v. *A Motion Picture Entitled "I Am Curious (Yellow)"*, 404 F.2d 196 (2d Cir. 1968), reprinted in Jurisdictional Statement as Appendix D, pp. 47a-62a.

On February 19, 1969, prior to exhibition of the film in any theatre in the United States, Grove entered into a contract with appellant 5 West Amusement Co., Inc. (hereinafter "West"), an owner of motion picture theatres in Baltimore, Maryland, for the exhibition of the film at the 7 East Theatre in Baltimore (J.A. 502-503).[1] Pursuant to national distribution policy which Grove had adopted, and which it had represented to

[1] "J.A." stands for the printed Joint Appendix filed in the court below and with the Clerk of this Court. "App." stands for the printed appendix required by Rule 36 of this Court containing, *inter alia*, the opinions of the court below.

the United States Court of Appeals, the agreement provided that admission would be limited to persons 18 years and older (J.A. 503). The same representation was made to the Circuit Court for Baltimore City in this case (J.A. 503-504).

The film was distributed nationally, and it first opened in New York City on March 10, 1969. As of July 1, 1969, the evidence showed, it had been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland.[2]

On July 1, 1969, Grove and West, reserving the right to challenge the constitutionality of the statutory requirements of prior submission,[3] made application to the Maryland State Board of Censors for a license for the exhibition of the film in Maryland. On July 8, 1969, the Board made an administrative determination that the film was obscene, disapproving the film and declining to issue the license (J.A. 10). With this determination as its jurisdictional requisite, the Board on July 11, 1969, petitioned the Circuit Court of Baltimore City, pursuant to Md. Code Ann., Art. 66A, §19, for a judicial determination of the film's obscenity.

The petition was served upon appellants on Saturday, July 12, and on Tuesday, July 15, they filed

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[2] The film is currently being shown, or has already been shown, in the cities listed in Appendix C, pp. 11a-13a, *infra*. Current figures indicate that as of July 15, 1970, the film has been exhibited to more than five-and-a-half million people in the United States.

[3] Of the four States which were noted in *Freedman* v. *Maryland*, 380 U.S. 51, 59 n.5 (1965), as having motion picture censorship statutes, only Maryland still enforces a censorship law applicable to adults. See App. E at pp. 24a-25a, *infra*.

a motion raising preliminary objection. The substance of the motion was that prior judicial determination by the United States Circuit Court of Appeals for the Second Circuit operated to preclude further censorship proceedings based on the alleged obscenity of the film (J.A. 11). On that same date appellants filed interrogatories requesting the Board to "[s]tate the names and addresses of all experts who were consulted by the Maryland State Board of Censors in connection with its review of the application for a license for the showing of a film," and to "[i]dentify which, if any, of the persons named in the answer to the preceding interrogatory advised the Board that the dominant theme of the film taken as a whole is not an appeal to prurient interest in sex or that the film is not utterly without redeeming social value" (J.A. 14-15).

The hearing began on July 16, 1969. In response to the request for interrogatories, counsel for the Board declared, "I am not prepared to state one way or the other whether there were experts who saw the film who advised the board as [appellants' counsel] suggested they might have been advised." (J.A. 26). He also argued that the Board does "not conduct normal administrative proceedings," and that "we don't believe that it is up to us to give any aid and comfort to the defendant in this case to try to help him prove what he would like to prove, which I don't believe he is going to be able to prove, and we resist the motion" (J.A. 27). The trial judge initially reserved ruling on the requested interrogatories, and subsequently denied the request (J.A. 243). *Inter alia*, the court also denied the motion based upon the decision of the Court of Appeals for the Second Circuit on the ground that the courts of Maryland are not

bound by a decision of a federal court of appeals and "there is no difference between the first and any other amendment in that respect" (J.A. 29-30).

The court then viewed the film[4] and heard the testimony of four witnesses for the State (J.A. 31-242).[5] Eight witnesses, including several heads of departments at institutions of higher learning, testified for the appellants.[6] The appellants also introduced reviews of the film from national magazines and newspapers of wide circulation (J.A. 244-553; J.A. 319, 553).[7]

On July 31, 1969, the Circuit Court for Baltimore City, after viewing the film a second time, entered a Memorandum Opinion and Order disapproving the film for licensing under the statute (J.A. 1-11). The Court noted that it "was impressed by the testimony of one witness, at least as I interpreted it, who testified that, in his opinion, this is a serious film strongly put together, confusing to some, but that it would not hold together without the sex scenes" (J.A. 8). The court then rejected the testimony of appellants' expert witnesses "and their explanations of the reasons for the various objectionable scenes" (J.A. 9) and found that the film was obscene under the three-pronged test of *Memoirs* v. *Attorney General*, 383 U.S. 413 (1966).

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[4] A brief description of the film which was submitted to the Court of Appeals of Maryland as an appendix to appellants' brief appears in the Jurisdictional Statement as Appendix F, pp. 66a-69a.

[5] The testimony of the States' witnesses is summarized in the Jurisdictional Statement, Appendix G, pp. 70a-79a.

[6] The testimony of the defense witnesses is summarized in the Jurisdictional Statement, Appendix H, pp. 80a-89a.

[7] Copies of the reviews are bound into the rear of the second volume of the Joint Appendix.

On appeal, the Court of Appeals of Maryland affirmed by a division of 4-to-3. The majority opinion, apparently giving weight to "the visual impact of a motion picture as contrasted with the printed word," concluded that "the overriding theme is sex per se" and "that the dominant theme of the film taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters." The majority concluded that the film was "utterly without redeeming social value" because "the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience," was "patently strained and contrived." The majority also rejected the contention that the decision of the Court of Appeals for the Second Circuit foreclosed obscenity proceedings by the State on the ground that "only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us."

Chief Judge Hammond and Judges McWilliams and Singley dissented in an opinion by Judge McWilliams which summarized the expert testimony offered in support of appellants' position as "an impressive array of witnesses . . . [including some] who . . . are considered to be the foremost authorities in this State on the motion picture, . . ." The dissenters concluded that their views, and the views of serious movie reviews "reflect at least 'a modicum of social value,'" and they agreed with the opinions of Judges Hays and Friendly of the Court of Appeals for the Second Circuit that the film's social and sexual themes are interrelated.

SUMMARY OF ARGUMENT

1. The film "I Am Curious (Yellow)" cannot be found obscene in the constitutional sense under any of the tests developed in this Court's opinions on the subject of obscenity. It is plain, we submit from an examination of the film itself, that its dominant theme is not an appeal to the prurient interest and that it contains substantial material of "redeeming social value"—both in the artistic and social sense. The view of experts who testified during the trial and of reviewers and critics whose opinions have been published in national magazines and newspapers more than amply support the conclusion that the film is a leading artistic effort, pathbreaking in its attitude towards candor on the screen, but definitely not obscene or pornographic. The history and policy of the First Amendment's Free Speech and Press Clause, as well as the decisions of this Court, require that the same test for obscenity be applied for motion pictures as for books. The decision of the Court of Appeals for the Second Circuit that the film qualifies as free expression under the First Amendment should be approved by this Court.

2. The Maryland film licensing statute under which the film was banned is unconstitutional in several respects. *First*, it reaches conduct which is plainly protected under the First Amendment because it prevents use and exhibition of films *in vacuo*, without any consideration of the surrounding circumstances, contrary to the principles established by this Court's recent decisions. *Second*, the obscenity standard, as defined in the statute, is plainly overbroad—thereby permitting the Board of Censors to suppress films which are within the range of constitutional protec-

tion. *Third*, the statute permits long delays before a final judicial decision is made regarding the obscenity of a film, in violation of the rule laid down by this Court's cases involving such licensing schemes. The Boards procedures do not meet minimal constitutional standards.

3. The First Amendment also prevents Maryland from suppressing "I Am Curious (Yellow)" because the non-obscenity of the film was conclusively determined in the United States Court of Appeals for the Second Circuit in an action binding upon the federal government. National distribution of films and books in this country would be seriously hindered if each State and local jurisdiction could compel the publisher or distributor and local booksellers or exhibitors to litigate the alleged obscenity of a book or film. Although the State was not a party in the federal action, it could have participated as *amicus* or as a party. In order to secure the First Amendment right to the distribution of non-obscene matter, this Court should hold, in this case, that a decision of the kind reached by the Court of Appeals for the Second Circuit forecloses action by State and local agencies based upon alleged obscenity of the film.

4. This Court's recent decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), supports the principle that the possession and use of even admittedly obscene material is constitutionally protected by the First Amendment if it does not intrude on private sensibilities, if it is not sold in "pandering" fashion, and if it is not made available to juveniles. The Court recognized in *Stanley* a First Amendment right secured to any adult "to read or observe what he pleases." 394 U.S. at 565, 568. The

effect of the decision below is to infringe upon these rights by preventing willing adults, who have full knowledge what they may see on the screen, from gathering together in an exhibitor's private theater to view "I Am Curious (Yellow)." If a single individual who is wealthy enough to purchase a print of the film may see it in his library or basement, that right should not be denied to others who cannot afford to pay what a print costs.

5. Finally, we argue that the appellees and the trial court erred in refusing to engage in full disclosure of the names of experts who had seen the film at the request of the Board of Censors. A State is not constitutionally entitled to suppress favorable leads in a criminal case, and the same rule must apply where First Amendment rights are at stake.

ARGUMENT

I

THE EXHIBITION OF "I AM CURIOUS (YELLOW)" IS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS FROM GOVERNMENTAL SUPPRESSION BECAUSE THE FILM CANNOT BE DEEMED "OBSCENE IN THE CONSTITUTIONAL SENSE"

This case concerns an attempt by the governmental authorities of the State of Maryland to prevent the public exhibition of a serious and important Swedish motion picture which has already been seen by an estimated five and a half million adult Americans in 33 States,* has been the subject of reviews and articles in

* A list of the cities where the film has been commercially shown appears as Appendix C, pp. 11a-13a, infra. The total estimated audience has been computed by dividing the average admission charge ($2.50) into the film's total gross receipts to July 15, 1970. On this basis, the estimated total is 5,678,440.

more than 100 newspapers and magazines in the United States,[9] and was selected by *The New York Times* film critic as one of "The Twenty Best Films of 1969."[10] In reviews introduced below, the film was characterized as: "the world's first honest" motion picture,[11] a "sociological assault on Swedish socialism, Swedish mores and Swedish morals";[12] "(an) earnest portrait of questioning, questing youth confronting the smug liberalism of an enlightened middle-class society;"[13] and "a good, serious movie about a society in transition."[14] Other commentators suggested it was a "genuinely vile and disgusting Swedish meatball,"[15] and "almost unbearably dull."[16]

[9] These are listed in Appendix B, pp. 6a-10a, *infra*.

[10] *New York Times*, December 28, 1969, Sec. D, pp. 1, 13 and 26.

[11] *Holiday*, December, 1968 (Def. Ex. 11e).

[12] *The Philadelphia Bulletin*, April 24, 1969 (Def. Ex. 11k).

[13] *Life*, March 21, 1969 (Def. Ex. 11A).

[14] *The New York Times*, March 11, 1969 (Def. Ex. 11K). The existence of such commentary can be considered proof enough that a film or book is entitled to constitutional protection. *Attorney General* v. *A Book Named "Naked Lunch"*, 218 N.E. 2d 571 (1966); *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964); *Grove* v. *Gerstein*, 378 U.S. 577 (1964).

[15] *The New York Times*, March 23, 1969 (State Ex. 5).

[16] *The News* (Washington, D.C.), April 1, 1969. Such evidence is probative not of the truth of the matters contained therein, but of the existence of a *public interest*. It should not matter as a constitutional free speech question, whether one or one thousand critics or laymen consider a book or a film important. See Mill, *On Liberty*: "If all mankind minus one were of one opinion, and only one person were of contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

The majority of the Court below acknowledged that experts had characterized the film "as a quest for identity with reality, on the part of a young heroine, amidst the shifting sands of social, moral, political, economic, and cultural transition . . . [and] as representative of the younger generation in Sweden, their hope for a classless society, their adherence to non-violence, and their demonstrable hostility against the Franco-type totalitarian state" (App. 9).[17]

The majority concluded, however, the film should be suppressed as obscene, not withstanding its serious nature and content because it "vividly depicts six different acts of sexual intercourse in various positions and locales." (App. 10). These selected scenes, which "take only about 10 minutes out of 120,"[18] constitute the only asserted justification for suppression of the film. The majority's judgment, as we shall show, involved a gross misapplication of the federal

[17] Stanley Kauffmann, one of the nation's leading authorities and critics of motion pictures, described the content of the film briefly as follows in *The New Republic* of March 15, 1969:

> The story is about a young Stockholm girl whose working-class father is a defeated libertarian. (He fought briefly in Spain against Franco.) With some education, she is emerging out of class constriction into an atmosphere of question: questioning everything—social and political and religious acceptances, military tradition, the Bomb, and—inevitably—sexual conventions. As a parallel to her curiosity, Sjoman [the director] has used an inquisitive method in his directing: moving continually between a documentary style, straight fictional narrative, and even into the making of the fiction. (We often see the crew and the director.) The patent purpose is to show that he is questioning the acceptances of his own world as his central character is questioning hers.

[18] Dissenting opinion of Chief Judge Lumbard in *United States v. A Motion Picture Film Entitled "I Am Curious (Yellow)"*, 404 F.2d 196, 203 (2d Cir. 1968).

constitutional tests established by this Court, to govern determinations of obscenity, with respect to books and films.

The film "I Am Curious (Yellow)" cannot be considered obscene under any of the constitutional tests contained in the opinions of this Court and its members since, and including *Roth* v. *United States*, 354 U.S. 476. At the outset of our analysis, we wish to note what should be obvious from the most cursory examination of the film: "I Am Curious (Yellow)" is of a totally distinct *genre* from the material which this Court must pass upon in run-of-the-mill obscenity cases. It differs, *toto caelo*, from the "peepshow" and "striptease" films which were before this Court in a series of cases summarily reversed in 1967 and 1968 following the decision in *Redrup* v. *New York*, 386 U.S. 767 (1967).[19] And little political sensitivity or artistic expertise is needed to recognize that its purposes and achievements are more serious and significant than those of the motion picture ruled non-obscene by this Court in *Cain* v. *Kentucky*, No. 347, O.T. 1969, decided March 23, 1970.

A. The Dominant Theme of the Film Taken as a Whole Does Not Appeal to Prurient Interest. Neither is the Film so Offensive on its Face as to Affront Current Community Standards of Decency.

In *Roth* v. *United States*, 354 U.S. 476, 489 (1957), this Court announced the germinal constitutional test for obscenity—"whether to the average person, apply-

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[19] *E.g.*, *Ratner* v. *California*, 388 U.S. 442 (1967) ("Honey Bee"); *Cobert* v. *New York*, 388 U.S. 433 (1967) ("Jayne Palmer No. 2", "Jayne Tracy"); *Schackman* v. *California*, 388 U.S. 454 (1967) (assorted "peepshow" films); *I. M. Amusement Corp.* v. *Ohio*, 389 U.S. 573 (1968) ("Beautease Models").

ing contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In discussing this test, the Court made several observations regarding the kind of material which it intended to exclude from the scope of that definition. *First*, the Court unequivocally rejected the bygone standard of *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, that material might be classified as obscene on account of "the effect of isolated passages upon the most susceptible persons." 354 U.S. at 488-489. The Court held that the material must be judged "as a whole" and that its effect on "the average person, applying contemporary community standards" was the proper guide.

Second, the Court noted (354 U.S. at 487) that "sex and obscenity are not synonymous," and that "[t]he portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[20]

Third, the Court cautioned that the First Amendment protects "ideas having even the slightest redeeming social importance" and defined the term "obscenity" as impliedly encompassing only such material as is "utterly without redeeming social importance." 354 U.S. at 484. The Court warned that "material which does not treat sex in a manner appealing to prurient interest" was to be afforded the full scope of First Amendment protection. *Id.* at 488.

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[20] This proposition was amplified in Mr. Justice Brennan's opinion announcing the judgment of the Court in *Jacobellis* v. *Ohio*, 378 U.S. 184, 191 (1964): "It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."

The film at issue here falls squarely within the protected area defined in the *Roth* opinion. It is plain from even the most fleeting analysis of "I Am Curious (Yellow)" that it depicts the turbulent life of a 22-year-old Swedish drama student and the development of her political, moral and social attitudes. Included in the characterization of the film's protagonist is a love affair she has with a young man. Her lover's insincerity and deception arouse in her emotions which conflict sharply with her evolving political views regarding nonviolence and pacifism. The film comes to grips with this conflict and traces its effect on the central character's home life, her attitude towards her father and her own maturation.

"I Am Curious (Yellow)" contains several scenes depicting that "great and mysterious motive force in human life" (354 U.S. at 487) with greater honesty and directness than it is treated in the feature films ordinarily seen in commercial motion picture theatres. But those scenes—which make up less than ten percent of the film's footage—cannot justify suppression of the film, particularly in light of all three *caveats* expressed in *Roth*:

First, to suppress the film on account of the explicit scenes would be tantamount to ignoring the remaining 110 minutes—in violation of the rule that the film must be judged "as a whole." There is much more to "I Am Curious (Yellow)" than the sexual encounters between the central character, Lena Nyman, and the young man, Borje. There is, as well, great emphasis on Lena's developing political views, on her search for values in life, and on her relationship with her father, and to her hero-images, including the Russian poet Yevtushenko and Martin Luther King. The film *in*

its entirety cannot be said to have, as its dominant theme, either the subject of sex in general or an appeal to the prurient interest. To be sure, sex plays a role in Lena's life, as it does in the life of any healthy 22-year-old girl. But in according less than ten percent of the film's footage to Lena's sexual life, the motion picture probably makes sex less a "dominant theme" than it is in real life. Anyone vaguely familiar with today's "restless youth" knows that no fair portrayal of that generation can ignore sex. And the film treats the subject in an honest and unexaggerated manner; it does not manifest any "itching," "morbid," "lascivious" or "shameful" characteristics of the kind which typify material catering to prurient interests.[21] Com-

[21] Nationally recognized critics also pointed out the honest and non-prurient portrayals of sexual relations which distinguished this Swedish film. Thus, Vincent Canby observed "This scene and others in which Lena and Borje effect sexual congress . . . are explicit, honest, and so unaffectedly frank as to be nonpornographic. . . . By acknowledging the existence of genitalia and their function in the act of love, the movie salvages the depiction of physical love from the scrap heap of exploitation, camp and stag films." (*N.Y. Times*, March 11, 1969; Def. Ex. 11). Richard Schickel said. "This movie does, in fact, go further than any previous theatrical film in showing male and female genitals nude and functionally employed . . . But we have, in every area of thought and art, being brought so teasingly close to this level of explicitness that it is a relief to arrive there finally and be done with it. Indeed, I should say that the sight of Lena Nyman, his leading lady, naked, is one of the best earnests of (the director's) seriousness. A panderer would have picked a prettier creature." (*Life*, March 21, 1969; Def. Ex. 11). Hollis Alpert noted, "certainly, the girl and boy of the film do make love frequently, and in a variety of positions and circumstances. They *are* seen in the nude, but not suggestively." (*Saturday Review*, March 15, 1969). Leonard Gross said "The sexual scenes do not arouse at all." (*Look*, April 29, 1969). William Wolf saw that the director "does not work at arousing an audience; he's too preoccupied with naturalism. Nor has he chosen an especially alluring couple." (*Cue*, March 15, 1969).

pare *Roth* v. *United States*, 354 U.S. at 487, n. 20 (1957).

Second, the absence of exaggeration and the de-emphasis of morbid or erotically arousing material plainly puts the challenged film footage in the realm of "portrayal of sex," not in the area of "obscenity." Even the majority below grudgingly admitted "there are times when the love scenes are introduced with some grace . . ." (App. 15). This aspect alone of the film would be sufficient to qualify these scenes—even if they stood alone (which, of course, they do not)—as "material dealing with sex . . . that has literary or scientific or artistic value . . ." *Jacobellis* v. *Ohio*, 378, U.S. 184, 191 (1964); see note 20, *supra*.

Third, in light of the strong warning in *Roth* against overextension of the permissible limit of government regulation of obscenity, a heavy burden falls upon the State to establish that this film "treat[s] sex in a manner appealing to prurient interest." 354 U.S. at 488. The most that can be said about "I Am Curious (Yellow)" is that in certain select scenes it treats sex more openly that has heretofore been the custom; such a conclusion is far removed from a finding that the treatment of sex in less than ten percent of the film transforms the film into one designed to appeal to prurient interests. Moreover, while the director's frank portrayal of the sexual relations between Lena and Borje may appear "unorthodox," "controversial" or even, in the minds of some, "hateful to the prevailing climate of opinion" (354 U.S. at 484), this insistence on candor can hardly be equated with "prurience"—*i.e.*, with itching, longing, morbidity or lasciviousness. Rather, it is a path-breaking approach to the treatment of sex in films—as much as D. H. Lawrence's

Lady Chatterley's Lover involved a departure from the typical treatment in novels of sexual relations. See *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960).

We point out that such admitted departures from the conventional paths taken in most books or films with regard to descriptions and representations of sexual relations is *in no way* tantamount to confessing that the works involved are "patently offensive" to contemporary community standards of decency, in the sense determined to be essential to obscenity findings, by the Court in *Manual Enterprises v. Day*, 370 U.S. 478 (1962). There, in an opinion by Mr. Justice Harlan, followed since in the Court's plurality opinions in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and *Memoirs v. Attorney General*, 383 U.S. 413 (1966), the Court held that material could not constitutionally be held obscene unless it also contained "an element which, no less than 'prurient interest,' is essential. . . ."—this was "patent offensiveness," a "self-demonstrating" indecency of a sort approaching, if not equivalent to "hard-core pornography." Since even "acknowledged masterpieces" might "not beyond reason be claimed to appeal to the 'prurient interest' of the reader or observer," in their "dominant theme," the Court held "it necessary the material be found also to be beyond the pale of contemporary notions of rudimentary decency." It is clear, we submit, that "I Am Curious (Yellow)" is not patently offensive to contemporary standards of decency, is not a film of self-demonstrating indecency, and is in no way pornographic. While the fact that this Swedish film has already been seen by more than five-and-a-half million Americans may have some bearing on its pace-making qualities in

the area of sexual representation, that fact on its face must disprove the contention that the film is beyond the pale of contemporary community standards of decency.[22]

B. The Film Possesses Substantial Material of Redeeming Social Value.

"I Am Curious (Yellow)" cannot by any reasonable stretch of the judicial imagination, be viewed as "utterly without redeeming social importance" within the meaning of *Roth's* demarcation of the line between obscenity and constitutionally protected material, much less as "unqualified worthless" under the rule applied in *Memoirs v. Attorney General*, 383 U.S. 413 (1966), or "utterly without social importance," under *Jacobellis, supra.* In the *Memoirs* decision, this Court determined that a classic "erotic novel," which was described by a Justice of this Court as "nothing more than a series of minutely and vividly described sexual

[22] It is important to note that the majority below did not reach its conclusion, or attempt to justify its judgment and its deviation from the Second Circuit judgment on the basis that the constitutional freedom of the film was required to be evaluated in terms alone of Maryland community standards of decency, as distinguished from standards elsewhere in the nation. Opinion and testimonial evidence was received at the trial, and noted by the appellate court, from both national and Baltimore areas. Thus, this case presents no legal question relating to a right of the state of Maryland to prohibit the circulation within its borders of material which "goes substantially beyond (Maryland's) customary limits of candor" or "affronts" Maryland's "current community standards of decency," as distinguished from the possibly more generous limits and standards of sister States or of the rest of the nation—assuming this matter was not settled by the plurality opinion in *Jacobellis v. Ohio.* However, it it submitted that the reasoning of *Jacobellis v. Ohio* is unassailable, if the disparate exercise of state police powers in the obscenity field is not to make a crazy quilt of First Amendment freedoms. Surely, where free expression rights are at stake, the outer limits of the police power of the several states must be uniform. See also pp. 36-39, *infra.*

episodes" (383 U.S. at 415), was entitled to constitutional protection because of the "modicum of social value" arising out of its "literary merit, . . . skill in characterization and . . . gift for comedy" and the part it played "in the history of the development of the English novel" (383 U.S. at 419). The film in issue here far exceeds the book involved in *Memoirs* in social value, both because, as was true of "Memoirs," the sexual episodes are presented with artistic skill and a "gift for comedy," and because, unlike "Memoirs," there is much more to the film than its sexual episodes.

(1) *The film's artistry.* The testimony of experts at this trial established that the film in general, as well as the sexual sequences, were replete with artistic innovation and skill. And the testimony is confirmed by the published critical opinion,[23] most of which is favorable to the film. With respect to the sexual scenes, for example, the Acting Director of the Humanities Center at Johns Hopkins University, Dr. Richard A. Macksey, testified that the producer of "I Am Curious (Yellow)" introduced "a different kind of artistic solution." (J.A. 256, 257):

> He keeps interrupting sexual scenes, you remember, by getting frames, story and the television, the film makers outside, the reminders. I think these are all distancing effects. I would argue they tend

[23] See, *e.g.*, the reviews appearing in *New York Times*, March 11, 1969; *Saturday Review*, March 15, 1969; *Cue*, March 15, 1969; *Look*, April 29, 1969; *The Washington Post*, March 11, 1969; *Boston Herald Traveler*, May 29, 1969. Again, we wish to note that the requisite redeeming social value is shown not by the existence of favorable reviews, but by the existence of public commentary or support. See notes 7 and 8.

> to operate against pornographic or prurient response simply because he keeps reminding you this is a film and it is being made as a film and these interruptions occur . . . almost predictably when there is a sexual sequence.

With regard to one of the sexual episodes, Dr. Macksey testified (J.A. 259-260):

> The editing, I thought, was quite brilliant . . . This particular one is very brief. He chooses to make the focus of it not the scene itself, but the fact of the guardsman in front of the palace, his adam's apple and so on. Then the quick transition is to fantasy, with the link being the use of the Swedish anthem in this peculiar rock time.

Speaking of the "interior scenes at Rumskulla"—again involving sexual episodes—Dr. Macksey testified (J.A. 260):

> I think cinematically there are a few effects in lighting which I think are quite new. One was developed by the photographer . . . [H]e devised a way of using morning light by blocking the window. He makes a kind of diagram with various pictures he puts against the window to control the light.

When asked in cross-examination about another sexual episode, Dr. Macksey replied (J.A. 278, 279):

> He [Sjoman] did very much want to show the faces. He talks about this in the diary. This is one reason it ranges [*sic*] the bodies as he does. It allows them to avoid some of what he seems to suggest are the leering qualities of the normal

> shooting of sexual scenes, as I say . . . She is absolutely outraged at the time . . .

Dr. Macksey also testified, both on direct and cross-examination, that the sexual episodes were filmed with humor (J.A. 264, 290, 294, 321-322), and that the particular conduct engaged in by the characters during the sexual episodes was based upon "a valid artistic judgment" by the producer with respect to the "character motivation" (J.A. 322-323).

Other experts also testified about the film's artistic merit. The Chairman of the Department of Fine Arts at Goucher College, Dr. Lincoln F. Johnson, who has regularly been teaching courses in the art of the motion picture and has served on juries for the American Film Festival and Maryland Film Festival, testified that "I Am Curious (Yellow)" was substantially more artistic in its presentation of sex than other named films he had seen in Maryland (after they were approved by the Maryland State Board of Censors). Dr. Johnson concluded (J.A. 338):

> Now, quite frankly, I find it very, very difficult —I am going to say this—to comprehend how the Censor Board can pass a vulgar, meretricious exploitation movie like this [a film called, "Sappho, Darling"] and cause trouble with a serious film by a serious film artist on serious social themes like "I Am Curious (Yellow)."

Dr. Roland H. Paulson, Chairman of the English Department at Johns Hopkins University, testified that the film has "artistic, esthetic merit" (J.A. 440), and the Director of the Fine Arts Program at the University of Maryland, Dr. Irving Brown, concluded

under oath that the film has artistic merit because it "is a good try at some interesting forms, using a number of different frameworks and a number of things at the same time" (J.A. 491).

Testimony of substantially the same effect as that presented in the trial below was presented in the course of six other trials relating to the alleged obscenity of "I Am Curious (Yellow)",[24] the trial in the United States District Court for the Southern District of New York following the Bureau of Customs seizure,[25] and a trial in the Superior Court of of New Jersey, Chancery Division, Essex County, which resulted in a finding that the film was constitutionally protected against suppression.[26]

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[24] *Grove Press, Inc.* v. *Melvin Bailey*, et al, Civ. Action 69-770, (U.S. District Court for Northern Dist. of Alabama); *Grove Press, Inc., et al* v. *Anthony B. Flask, et al*, No. C69-735, (U.S. Dist. Ct., Northern Dist. of Ohio); *Kansas* v. *A Motion Picture Entitled "I Am Curious Yellow"*, No. 6122, (Dist. Court of Johnson City, Kansas); *North Carolina* v. *Halsey Melone*, Cr. No. 28,000 (General Court of Justice, Guilford County); *Commonwealth of Massachusetts* v. *Serafim Karalexis*, Nos. 43068-69-70-71, (Suffolk County Superior Court); and *State of New Hampshire* v. *Donald Critchley*, (Derry District Court). See Appendix D, pp. 14a-23a, *infra*, for a list of those who testified and a summary of their qualifications.

[25] Brief summaries of the testimony in the federal case appear in *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)"*, 404 F.2d 196 (2d Cir. 1968), and at pages 189-254 of the scenario of the film introduced in evidence below as Defendant's Exhibit 9, and appended to Appellant's Reply to the Motion to Dismiss or Affirm in this Court.

[26] The testimony of the experts in the New Jersey proceeding (*Lord* v. *United Artists*, No. C-787-69, Chancery Division, Essex County), is summarized in the opinion of the Chancery Court, reprinted at pp. 1a-15a of our Reply Memorandum to the Motion to Affirm in this case.

(2) *The social importance of the film.*—Unlike *Fanny Hill*[27] and unlike "I, A Woman",[28] and unlike "peep-show" or "striptease" films[29] and unlike the various photo magazines considered in last Term of Court,[30] "I Am Curious (Yellow)" deals very substantially with subjects other than sex. The first portion of the film traces the development of Lena's political and social consciousness. It includes an extensive interview made especially for this film with Olaf Palme, now Prime Minister of Sweden, and film clips from an interview with the late Dr. Martin Luther King. These sequences, as well as two short scenes with the famous Russian poet Yevgeny Yevtushenko, are integral to the film's depiction of Lena's increasing political awareness.

Among the serious subjects addressed in the course of the motion picture are pacifism, nonviolence, class distinctions, the Swedish monarchy, the war in Vietnam, Franco Spain, and nuclear warfare. The film also traces Lena's relationship with her father, towards whom she bears substantial resentment because of personal failings. All these themes are related to the central character's personal development, and are influenced in no small part by her love affair with Borje. When her regard for Borje is at its peak, for example, Lena imagines him as Sweden's last

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[27] *Memoirs* v. *Attorney General*, 383 U.S. 413 (1966).

[28] *Cain* v. *Kentucky*, No. 347, decided March 23, 1970.

[29] *Schackman* v. *California*, 388 U.S. 454 (1969); *Ratner* v. *California*, 388 U.S. 442 (1967).

[30] *Carlos* v. *New York*, No. 524, *reversed per curiam* on December 8, 1969; *Johnson* v. *Massachusetts*, No. 458, certiorari denied December 15, 1969; *Bloss* v. *Dykema*, No. 1347, *reversed per curiam* on June 1, 1970; *Walker* v. *Ohio*, No. 1470, *reversed per curiam* on June 15, 1970; *Hoyt* v. *Minnesota*, No. 1544, *reversed per curiam* on June 29, 1970.

Crown Prince in a satirical dream scene. By contrast, when she feels most hostile towards Borje, Lena bitterly rejects Dr. Martin Luther King's doctrine of nonviolence.

The experts who testified at the trial called attention to the important social themes of the film. The Chairman of the Department of Social Relations at Johns Hopkins University, Dr. Peter H. Rossi, testified that the film has social significance "along the following line" (J.A. 411):

> At the present time throughout the world, we see young people criticizing the present form of society and searching in various ways for a new style of life, so to speak. Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but also is critical of the Chinese, the Russians and the like. It is not a very articulated criticism. This is not a film with an explicit political message. It is a film which says there is something wrong and it is a film which says also that young people like the heroine are searching for a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives, expressed partly in her criticism of her father and partly in her search for a very personal, warm, deep relationship with others. It is also a tragedy in the sense she is unable to somehow fulfill that, both because the man she picks on turns out to have deceived her, and also because she deceives herself. She worships for a moment—I put that worshipping in quotation marks— the figure of Mar-

> tin Luther King as an exponent of nonviolence. After she herself has expressed violence in the forms of aiming the shotgun at the lover, and also the fantasy in which she attempts to castrate the lover in the fantasy . . ., she has betrayed her own aspirations. It seems to me that theme of striving for a new way of life and not quite being able to make it is profoundly religious in character, in a very, very broad sense of religious, and expresses, it seems to me, the kind of struggle for a new way of life being expressed by young people throughout the world in a variety of ways.

Dr. Paulson, the Chairman of the English Department at Johns Hopkins, testified that the film deals "with an important subject, perhaps the most important subject that faces us right now . . . [the] breakdown in the relationship between the symbols of authority and the people, between parents and children" (J.A. 440). He concluded that the theme was important "even in the sense that in years to come this will have social documentary value in almost any sense of the word social" (*Ibid.*).

The majority of the court below recognized these various important themes in the film, but concluded, evidently on the basis of its own artistic judgment, that there was "no meaningful nexus" between the social and political issues presented in the film and Lena's "problem with her twenty-three lovers."[31] This conclusion conflicted with the testimony of all the defense experts, who stated their opinions that the sexual

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[31] In the course of the film Lena mentions that she has had sexual relations with 23 men, but the only love affair depicted on the screen is that with Borje.

scenes were definitely related to the political and social episodes in the motion picture.[32] The conclusion of the majority below even conflicted with that of the trial judge, who stated in his opinion that he was impressed by the testimony of Dr. Jaromir Stephany, a defense witness "who testified that, in his opinion, this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes" (J.A. 8). Finally, the conclusion of the

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[32] Dr. Macksey testified that the sexual relationship signified a "relationship between classes" and that each of the sexual episodes provided "symmetry" for the nonsexual themes (J. A. 258-259). Dr. Johnson testified that Lena's sexual behavior "reveals a great deal about [her] personal attitudes and about social attitudes" and that "it is in a large part through the sexual activity that Lena begins to discover what she actually is" (J. A. 334). Dr. Mackie testified that the depiction of Lena's sexual experiences is part of "the curiosity and exploration of her ideas, her views, herself taken on an intellectual level" (J. A. 382). Dr. Rossi testified that the sexual episodes were "part of the whole web of the story which the director is trying to put across" because his message is that "one should search for honesty, not merely in public life, but also in private relationships" (J. A. 412-413). Dr. Paulson testified that the sexual scenes were needed to depict "the breaking down of old, perhaps out-moded, at any rate cliched, sexual assumptions and poses" as "part of the general break down in confidence toward society in general and certainly between the daughter and the father" (J. A. 440). Dr. Irving Brown testified that "particularly in [Lena's] search for self or search for structure, for relationship, this [the sexual theme] was an important area of her existence and that she wished to investigate this as well as others in her very broad concern or very broad search for self" (J. A. 470). And Dr. Jaromir Stephany testified that without the sexual scenes "the film would not be able to hold together . . . if these were cut out or modified in anyway, the film would be destroyed" (J. A. 535). He explained on cross-examination that "[t] he particular portrayal of each sexual scene that appears in there is part of the character development within a certain relationship, and the changes in her relationships are shown partially through the way in which she was responding sexually" (J. A. 539).

majority below contradicted the views of a majority of the United States Court of Appeals for the Second Circuit, which determined, after seeing the same film, that the sexual episodes were integrally related to the remainder of the film.[23]

In these circumstances, there cannot be any doubt that "I Am Curious (Yellow)" possesses "social importance" sufficient to place it well outside even the broadest definition of obscenity applied by members of the Court.[24] Thus, even applying the test proposed by Mr. Justice White in dissent in *Memoirs* (383 U.S.

[23] See also the critical comment at note 21 *supra*. Virtually all the reviews and articles dealing with the film, listed at Appendix B, recognized the film dealt with social issues and political ideas. As Vincent Canby said: "A full length portrait of Lena, the troubled, liberated woman, simply could not exist without these (sexual) scenes." *N.Y. Times*, March 11, 1969; (Def. Ex. 11).

[24] Whichever test is used by this Court to adjudicate the threefold criteria of dominant prurient interest appeal, patent offensiveness and social importance, the judgment is inescapable that "I Am Curious (Yellow)" is not obscene. The choice of tests has been depicted by Mr. Justice Harlan (concurring in *Ginsberg v. New York*, 390 U.S. 629, 706.) thus: "One view is that we should simply examine the proceedings below to ascertain whether the lower federal or state courts *have made a genuine effort* to apply the *Roth-Memoirs-Ginsburg* tests, and that *if such is the case*, their determinations that the questioned material is obscene should be accepted, much as would any findings of fact. Another view is that the question of whether particular material is obscene inherently entails a constitutional judgment for which the Court has ultimate responsibility, and hence that it is incumbent upon us to judge for ourselves, *de novo* as it were, the obscenity *vel non* of the challenged matter." (Emphasis added). We understand the *de novo* test to be controlling. *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Even were it not, it is doubtful, we suggest, that a genuine effort to apply the tridented formula was made below, considering discontent with that formula expressed in the majority and concurring opinions, and the special weight attributed to a film, rather than a book being involved.

at 460-462), under which the "social importance" of a work "is relevant only to determining the predominant prurient intent of the material," the film at issue here cannot be classified as obscene. For the nature of its serious theme and the artistry with which it is executed establish that it is not a work with only a smattering of "social importance," but that it is, in essence, an important artistic work which cannot conceivably be characterized as "inherently and utterly without social value" (383 U.S. at 461).

These elements are among those which distinguish this film from *Un Chant D'Amour*, the 30-minute 8 mm. film, without sound, text or music, which was before this Court in *Landau* v. *Fording*, 51 Cal Rptr. 177 (1966), summarily affirmed, 388 U.S. 456 (1967). *Un Chant D'Amour* was described by the State court as a series of "erotic scenes [which] recur with increasing intensity and without direction toward any well-defined, wholesome idea, through scene after scene." The film portrayed "purely physical acts of increasing intensity without any contribution to character or plot development;" the acts were described as "male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy"—occupying in excess of half the footage of the film. On the basis of this description, the California court found the film to be "hard-core pornography."

C. The Film is Not "Hard-Core" Pornography Nor is it Commercially Exploited on the Basis of any Prurient Appeal.

1. *Pornography.*—A comparison of this film with the definition of "hard-core pornography" adopted by Mr. Justice Stewart in *Ginzburg* v. *United States*, 383 U.S. 463, 499 n.3 (1963), establishes how far re-

moved the material here is from what is traditionally viewed as "obscenity." The first sentence of the quoted definition is, "Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character." "I Am Curious (Yellow)" plainly *has* "artistic value;" it contains no scenes of "sodomy and sadism," and none "orgy-like" in character. Unlike the materials specified in the definition quoted by Mr. Justice Stewart, this film does not "grossly depict" any sexual activities "in an exaggerated fashion," nor sexual activities "in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."[35]

Another definition of hard-core pornography, which was accepted by the court below in its decision in *Hewitt v. Maryland State Board of Censors*, 254 A.2d 203, 211 (1969), was that provided by Chief Judge Fuld of the New York Court of Appeals in *People* v. *Richmond County News, Inc.*, 9 N.Y. 2d 578, 587 (1961):

> It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult if offers, invariably, to sex, and to the human spirit' . . . It is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the

[35] See also the definition of "pornography" contained in *Polsky, Hustlers, Beats, and Others* (N. Y. Anchor Books, 1969) "On The Sociology of Pornography" pp. 183-201.

> vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, . . . 'a debauchery of the sexual faculty.'

"I Am Curious (Yellow)" is not morbid, perverse or bizarre. It has ample artistic justification. It does not insult sex, nor it it vile, fantastic, unreal, or sexually sick. It is plainly, as the experts below testified (J.A. 264, 339, 377-380), totally distinguishable from pornography.

2. *Pandering—Privacy—Juveniles.*—The only exceptions which this Court has made with respect to materials otherwise non-obscene under the tridented test of *Memoirs* v. *Attorney General, supra,* have involved promotions or sales of such materials in ways which defeated the protected character of the material. Thus, in *Ginzburg* v. *United States,* 383 U.S. 463 (1966), a conviction for the sale of material which might not have been adjudged obscene in the abstract was upheld because the distributor's "sole emphasis" "was on the sexually provocative aspects of his publications," where the material "was commercially exploited for the sake of prurient appeal, to the exclusion of all other values." In *Redrup* v. *New York,* 386 U.S. 767 (1967), the Court made it plain that the legitimate area of regulation with respect to obscenity ordinarily requires evidence of pandering of the type found in *Ginzburg* v. *United States, supra* or an assault on privacy of the type occasioned in *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952), or a law reflecting a specific and limited State concern to protect juveniles, as in *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

Obviously, a film which had not been advertised or promoted anywhere in Maryland prior to its submission to the Board of Censors, and which by contract between the exhibitor and the distributor could not be shown to anyone under eighteen years of age, could not validly be condemned as commercially exploited for the sake of prurient appeal to the exclusion of all other values. Nor could it assault anyone's privacy, or present a danger of exhibition to juveniles. Maryland's system of censorship foreclosed the film's being distributed or exhibited anywhere and to anyone in the State, but the distributor had taken necessary steps to assure that the film would be advertised and exhibited only in responsible ways and to audiences which would not defeat the film's constitutionally-protected status.

D. The Same Constitutional Test of Obscenity is Applicable to Films As To Literary Works.

Appellees have argued in their Motion to Dismiss or Affirm that the test of obscenity prescribed in this Court's past opinions—particularly the element singled out in the *Memoirs* decision—applies only to literary works, and that a different standard should be applied to films. We submit that there is no basis in the language, history or policy of the First Amendment for any such distinction, and that no decision of this Court supports such a principle.

At the outset, it is important to lay to one side the question of whether different *procedures* may be prescribed by statute for the commercial exhibition of films than for the distribution of books. The often-quoted passage in support of the distinction urged by appellees between books and films is the statement in this Court's opinion in *Freedman* v. *Maryland*, 380

U.S. 51, 60-61 (1965), that "[t]he requirement of prior submission to a censor sustained in Times Film is consistent with our recognition that films differ from other forms of expression." But that "recognition" relates only to the dissemination of the material —*i.e.*, to the question whether a certain form of prior restraint may be imposed in the form of a pre-censorship scheme in order to determine whether material is or is not subject to regulation or suppression. Several possible policy justifications, such as the differing distribution methods of films to the general public and a differing likelihood of unexpected intrusions of private sensibilities might have been thought to justify such a *procedural* distinction, and the casual dicta scattered in other opinions. On the other hand, the Court may have overlooked such facts as that books, magazines, and other printed matter, of the type characteristically involved in obscenity cases, are more accessible to adults and children than 35 mm. films of the type usually involved in these cases. Similarly, printed matter not obscene as to adults, but possibly obscene as to children, may more easily fall into the hands of children than may 35 mm. sound films and the projection and screening equipment necessary to hear and view them. In addition, as concerns obtrusions, one can as readily close one's eyes against an "obscene" or offensive image in a movie being watched in a theatre, as close one's eyes upon obscene images in a book being read in a library, at home, or on a bus.

None of this means that a Board of Censors or any other governmental body which passes upon allegations of obscenity leveled against a film may judge it by different standards than it would a book. The basic rationale for any regulation of obscenity is, after all,

the historical and policy justification outlined in this Court's *Roth* opinion. And the nub of that rationale is that the distribution of obscenity may be restrained because it is "utterly without redeeming social importance." 354 U.S. at 484. If a film "does not treat sex in a manner appealing to prurient interest"—if it contains ideas, albeit ideas which are "unorthodox . . . controversial . . . [or] hateful to the prevailing climate of opinion" (354 U.S. at 484)—it is within the range of First Amendment protection.

As recently as *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969), this Court held that the First Amendment was fully applicable to unorthodox speech-connected activity. The Court said, "[W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a classroom." 393 U.S. at 513. It follows, we submit, that no watering down in the application of the First Amendment is permissible with respect to more traditional forms of expression such as motion pictures. For if the expression contained in a motion picture has a more powerful impact than that in a book—if it is, in short, a better means of communicating images, thoughts and ideas than the printed word, it is entitled all the more to constitutional protection. As the Supreme Court of Pennsylvania recently said in *Duggan* v. *Guild Theatre, Inc.* 258 A. 2d 858, 861-862 (1969), in passing on the same claim:

> The district attorney next urges that a different standard for determining obscenity should be used when dealing with motion pictures. He argues that a motion picture reproduces actual conduct through sight and sound and therefore, the impact on the

viewer is far more vivid. Presumably the district attorney is arguing that if the medium can portray what is alleged to be obscene with greater impact, the medium itself is deserving of less constitutional protection. We cannot accept this argument, for the First Amendment permits no such limitation on its protection of free expression.

This is so for at least two reasons. First, as a factual matter, we cannot say that the impact of an obscene work will always be greater when put on film. Each medium has a different type of impact, one which is difficult to qualify on any sort of obscenity scale. A nude figure seen on the screen for a short time may very well have less impact than a nude figure in a magazine, which can be leered at leisurely. . . .

Second, we find no indication in any United States Supreme Court decision that movies are to be treated differently than any other medium . . .

The decisions of this Court teach that the constitutional obscenity standard for books and films is the same. Following the decision in *Redrup* v. *New York*, 386 U.S. 767 (1967), which involved books and magazines, this Court summarily reversed, in light of *Redrup* (which set out the various obscenity tests applied by members of the Court), several cases involving motion picture films. *Ratner* v. *California*, 388 U.S. 442 (1967); *Cobert* v. *New York*, 388 U.S. 443 (1967); *Schackman* v. *California*, 388 U.S. 454 (1967); *I. M. Amusement Corp.* v. *Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp.* v. *Tennessee ex rel. Canale*, 389 U.S. 578 (1968). As recently as March 23, 1970, the Court summarily reversed, citing *Redrup*, a conviction based upon a showing of the film "I, A Woman."

Cain v. *Kentucky*, No. 374. And even prior to *Redrup*, when considering the alleged obscenity of the film "The Lovers," the Court applied the same standards as had been used in cases involving books. See *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

E. No Greater Leeway Should be Granted to Local Jurisdictions to Suppress Nationally Distributed Films or Literary Works Than is Granted to the Federal Government.

In his separate opinion in *Roth* v. *United States*, 354 U.S. 476, 496 (1957), Mr. Justice Harlan, speaking for himself alone, enunciated a constitutional rule under which different standards would be applicable to judge the permissibility of government action taken by States and local jurisdictions from that governing such action by the federal government. This view—also expressed in separate opinions in *Jacobellis* v. *Ohio*, 378 U.S. 184, 203 (1964), and *Memoirs* v. *Attorney General*, 383 U.S. 413, 455 (1966)—has recently been joined by the Chief Justice in *Carlos* v. *New York*, No. 524, O.T. 1969, decided December 8, 1969, 90 S.Ct. 395, and in *Cain* v. *Kentucky*, No. 347, O.T. 1969, decided March 23, 1970, 90 S.Ct. 1110, and tentatively by Mr. Justice Blackmun in *Hoyt* v. *Minnesota*, No. 1544, O.T. 1969, decided June 29, 1970. See also *Bloss* v. *Dykema*, No. 1347, O.T. 1969, decided June 1, 1970; *Walker* v. *Ohio*, No. 1470, O.T. 1969, decided June 15, 1970.

We submit that even assuming that such a constitutional proposition is valid in certain circumstances, it cannot be applied to this case for at least two reasons:

First, the court below did not purport to be applying any local standard to the three necessary elements for a finding of obscenity. Indeed, the concurring judge's

specific rejection of the plurality view of *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), that a "national" standard must be applied, indicates that the judges comprising the majority did, in fact, apply such a standard. Hence this is not a case in which Maryland can contend that the judicial determination made below was based upon a peculiarly local evaluation in the "domain of sexual morality." Harlan, J., in *Roth* v. *United States*, 354 U.S. at 502. Rather, the only basis for the suppression of the film is that the majority of the judges below reached a different conclusion on application of the "national" standards than did a majority of the Court of Appeals for the Second Circuit. In these circumstances, it is appropriate for this Court to evaluate the film by the standards assertedly applied below, and not to ascribe to the court below the safeguarding of standards of local morality on which it did not rely.

Second, while the absence of a uniform nation-wide standard in the area of obscenity might be permitted when the material at issue is produced and distributed locally, such a constitutional rule is a dangerous impediment to free expression whenever the expression consists of nationally distributed material. To place a national distributor of films or printed matter at the mercy of every local jurisdiction, with its different standards for what is permissible, is effectively to stifle, by "chilling," any speech which may be close to the borderline. The very same rationale relied upon to strike down a "vague" local ordinance in *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 683-684 (1968) (where Mr. Justice Harlan dissented only on the ground that the language was not impermissibly vague), is applicable here:

> The vice of vagueness is particularly pronounced where expression is sought to be sub-

jected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults —perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Surely the rights guaranteed by the First Amendment are entitled to no less protection than interstate commerce. Yet in a series of cases from *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), through

Morgan v. *Virginia*, 328 U.S. 373 (1946), to *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court has struck down local regulations which have, by imposing different requirements upon vehicles traveling in interstate commerce from those imposed by neighboring States, obstructed or hindered interstate travel and transportation. What the Court said with respect to the length of trains traveling in interstate commerce—*i.e.*, "a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation" (325 U.S. at 780)—cannot be less applicable to material coming within the scope of First Amendment protection. The "flow" of controversial films and books and periodicals will necessarily be hindered—if not totally suppressed—by a rule which would allow each jurisdiction to apply different standards for purposes of criminal prosecution and civil suppression. We submit that, at least where—as is shown by this record—the material is substantially distributed on a national basis, there is no room for flexibility or the application of differing standards among local jurisdictions. See also *In re Giannini*, 72 Cal. Rptr. 655, 446 P.2d 835 (1968); cf. *Edwards* v. *California*, 314 U.S. 160 (1941).

II

THE MARYLAND FILM LICENSING STATUTE IS UNCONSTITUTIONAL

We argue below that the judgment of the Maryland Court of Appeals must be reversed because of the Maryland censorship statute, on its face and as applied, exceeds permissible constitutional limits under the First Amendment. Our arguments relate (1) to the imposition of a blanket prior restraint upon the ex-

hibition of motion pictures, whether obscene or non-obscene, and regardless of the circumstances or audience, (2) to the standard prescribed in the statute—which is plainly an erroneous one; (3) to the lapse of time which is tolerated under the statutory scheme before final judicial review of the obscenity *vel non* of a particular film, (4) to the lack of procedural safeguards under the statutory scheme, and (5) to the peremptory nature of the sanction for violation of the censorship scheme.

A. The Maryland Statute Operates To Prevent the Exhibition of Films in Instances Where Such Exhibition Would Be Constitutionally Protected.

We note, preliminarily, that Maryland's obscenity-censorship law is an anachronism. It supports the only state or municipal censorship system in the United States which still attempts to regulate obscenity in films by punishing any failure to seek and win approval from a Board of Censors before any exhibition of a film to adults or to children, and under any circumstances.[26] The Maryland statute is grounded on the assumption that adults, like children, are not free under any condition or circumstances, to see a film which Maryland censors and judges consider obscene; this, regardless also of whether the film has been adjudicated non-obscene, as a matter of federal constitutional law, in other jurisdictions. Maryland thereby deprives adult residents of Maryland of the "now well established" constitutionally-protected right "to receive information and ideas . . . regardless of their social worth." (*Stanley v. Georgia*, 394 U. S. 557 (1969) and authorities there cited.) Since *Freedman v. Maryland*, 380 U. S. 51

[26] See the letter dated April 1, 1970 from The Motion Picture Association of America, *infra* at Appendix E, pp. 24a-25a.

(1965), and *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968), no other State or city has acted to maintain or defend such a system. Instead, following the admonitions of this Court in cases like *Redrup* v. *New York*, 386 U. S. 767 (1967), cities and States which have enacted related legislation have concentrated on securing classifications of suitability for varying audiences, and protecting the interests of juveniles.

The intended distributor and exhibitor of this film represented to the Board of Censors and to the courts below that exhibition would be restricted to persons eighteen years of age and older (J. A. 503-504). This policy has been followed by the distributor everywhere in the United States and has been incorporated in all contracts between the distributor and exhibitors. But Maryland's censorship law neither makes nor allows for any distinction between films intended for viewing by adults, and films intended for viewing by children, or by both adults and children. Nor, for that matter, does it make or allow for any distinction between films intended for viewing by a person in the privacy of his own home. All alike must be submitted to the censors, and all alike will be banned, regardless of the age or character of the intended audience and regardless of the nature of the circumstances of the intended use—if Maryland's censors consider them obscene, *in vacuo*, for public viewing by children and adults.

This Court's decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), accords constitutional protection to certain controlled exhibition of even concededly obscene films. The Maryland statute is overbroad because it forbids all exhibition or use of a film within the State until it is approved, including such exhibition or use as is within the range of First American protection under *Stanley*,

and such films as are within the scope of First Amendment protection under *Redrup*. We submit that a blanket prior restraint cannot, since this Court's decisions in *Redrup* and *Stanley*, be imposed upon exhibition or use of a film. The governmental authority must, rather, examine the nature of the audience and use to which the possibly obscene film is to be subjected, and may impose only such limitations as are consistent with the right recognized in the *Redrup* and *Stanley* decisions.

B. The Obscenity Standard of the Maryland Statute Is Patently Unconstitutional.

Section 6(b) of the Maryland licensing statute directs the Board of Censors to find a film "obscene"

> "... if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess."

The statutory definition is patently unconstitutional in at least three respects: (1) In substituting the "arousal of sexual desires" for the "prurient interest" standard prescribed by *Roth*, the statute sweeps in a variety of matter which would not be considered obscene under the language in *Roth*. "Sexual desires" may be deliberately aroused by films in which attractive actresses appear, but that is not the same as saying that they appeal to an "itching" or "lascivious" or "morbid" interest in sex. (2) By omitting the "contemporary community standard" prescribed by *Roth*, the statutory definition permits suppression of films which might not be obscene if judged by their effect on

the proper adult group.[27] (3) By assigning to the Board of Censors the task of determining whether the arousal of sexual desires "outweighs" the "merits" of the film, the statute violates the rule applied in the plurality opinion in *Memoirs* v. *Attorney General*, 383 U. S. 413 (1966), that "the social value . . . can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."[28]

In all these respects, the language of the Maryland statute sweeps too broadly—it authorizes the Board of Censors to suppress films which are not within the constitutional definition of obscenity. The statute therefore is covered by the principle enunciated by Mr. Justice Frankfurter, concurring in *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U. S. 684, 694, 695 (1959):

> The legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what is permissible expression as well as what society may permissibly prohibit. Always remembering that the widest scope of freedom is to

[27] This omission is aggravated by the fact that the Board the Censors need not be representative. Indeed, the appellee board consists of three elderly ladies, whose judgments on the description or representation of sex are not those of the community.

[28] Indeed, the statutory formulation appears to violate even the standard which Mr. Justice White would apply—*i.e.*, that the "merits" or "social importance" of a film is a factor in "determining the predominant prurient interest of the material." 383 U.S. 413 at 462. Even Mr. Justice White's test does not permit a court or a board of censors to "weigh" the merits of a work *against* its sexual content and determine which is more worthy;

> be given to the adventurous and imaginative exercise of the human spirit, we have struck down legislation phrased in language intrinsically vague, unless it be responsive to the common understanding of men even though not susceptible of explicit definition. The ultimate reason for invalidating such laws is that they lend to timidity and inertia and thereby discourage the boldness of expression indispensible for a progressive society.

The overreach of the Maryland statute cannot be cured by any narrowing interpretation given its language by the Maryland Court of Appeals. It is well-established by recent decisions of this Court that where statutes which limit First Amendment freedoms are challenged as overbroad, they must be tested on their face. *Aptheker v. Secretary of State*, 378 U. S. 500, 515-517 (1964); *Zwickler v. Koota*, 389 U. S. 241, 250 (1967). Consequently, the decision of the Maryland court in *Sanza v. Maryland State Board of Censors*, 226 A.2d 317, 327 (1967), holding that Section 6 of the licensing statute "is limited to what can be deemed obscene in the constitutional sense," is not adequate to save the statute from the infirmity of overbreadth. See also *Hewitt v. Maryland State Board of Censors*, 254 A.2d 203 (1969), where the limiting *Sanza* interpretation was reaffirmed.

The vice of overbreadth is particularly dangerous in a movie licensing scheme under which prior restraints to free expression are imposed by a governmental agency. For in such a context, it is not unlikely that the administrators will conform their standards to those in the statute rather than to the construction given by the courts. That danger was apparently realized here,

for the Order of Disapproval issued by the Board of Censors states that "I Am Curious (Yellow)" was denied a license because, *inter alia*, "it lacks any identifiable artistic, cultural, thematic or other value *which might be considered redemptive*" (J. A. 2; emphasis added). The plain import of this language is that, notwithstanding this Court's *Memoirs* decision, the Board of Censors applied the statutory test and determined that the "probability" of sexual arousal "outweighed" the merits of the film.

C. The Maryland Statute Tolerates Long Delays Before Final Judicial Decision.

Subsequent to *Freedman* v. *Maryland*, 380 U. S. 51 (1965), the Maryland legislature amended Section 19 of the censorship law to add a jail sentence to the penalties provided for non-submission of a film and prescribe fixed periods of time in which the Board of Censors and a trial court must act so as to invoke the processes and sanctions of the law. In *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 213 A.2d 235 (1965), the Maryland Court of Appeals held that this latter amendment fully satisfied the constitutional requirements of *Freedman*.

The State court overlooked, however, the fact that the amended statute sets no time limitation upon disposition of an appeal by the Maryland Court of Appeals. Hence the requirement of a "prompt, *final* judicial decision," prescribed in *Freedman* (380 U. S. at 59), is omitted from the Maryland procedure. The chronology of this case—in which (one month already having elapsed between the dates of initial submission of the film to the Board of Censors and the lower court determination) more than six weeks elapsed between the dates on which the case was argued in the

Maryland Court of Appeals and its disposition—demonstrates the type of delay which this omission generates and which the Court in *Freedman* correctly viewed as having a "potentially chilling effect . . . on protected expression," 380 U. S. at 61. In *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968), this Court concluded that a system allowing a possible delay of 50 to 57 days prior to judicial proceedings was constitutionally defective; the same must be held as to a system which permits a comparable time period to elapse between oral argument of an appeal and a decision in the case, especially if it can operate, as here, to prevent exhibition of a film previously declared to be nonobscene by a federal circuit court of appeals.

D. The Statute Lacks Procedural Safeguards.

The Maryland statute sanctions an administrative system devoid of procedural safeguards: the proceedings are secret, no record is made of the censors' deliberations, the identity of witnesses or experts consulted by the Board on the obscenity of the film are not disclosed, and no means is provided whereby the Board's processes may be challenged. For example, there is no way of knowing whether constitutional guidelines have been adhered to, whether the available opinions of reputable and qualified experts were considered, and whether representations concerning the age or character of the intended audience were accepted. All that is known is that the censors have seen a film, deliberated with or without the advice of qualified experts and other persons, and have reached a conclusion—barren of findings of fact or law, and barren of supportive reasons. These procedures would, we submit, be inadequate to warrant decisions with regard to property rights. *A fortiori*, they are impermissible when First Amendment liberties hang in the balance.

E. The Licensing Requirement Is Absolute And Does Not Permit Even Nonobscene Films To Escape Prior Review.

The Maryland statute subjects to summary criminal punishment any person who exhibits or uses a film which has not first been submitted to and approved by the Maryland Board of Censors. This applies to obscene and non-obscene films alike, and to both public and private exhibition or use. An exhibitor or user has no option not to submit a film to censorship, not even one which has already been held non-obscene, and constitutionally protected by a final judicial decision. Nor can he show any film he believes to be non-obscene, either in a theater to the general public or only to adults, or even in the privacy of his own home to himself or others. This Court in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957), indicated that prior restraints are valid provided that persons wishing to distribute allegedly obscene matter remain able to do so, pending a final judicial determination of obscenity and "subject only to later contempt proceedings—if the materials are obscene." 354 U. S. at 443. No such possibility exists under the Maryland film censorship statute.

III.

THE MARYLAND BOARD OF CENSORS MAY NOT CONSTITUTIONALLY PROHIBIT THE EXHIBITION OF "I AM CURIOUS (YELLOW)" BECAUSE IT HAS BEEN CONCLUSIVELY ADJUDGED NON-OBSCENE IN THE CONSTITUTIONAL SENSE IN AN ACTION BINDING ON THE UNITED STATES.

We argue herein that the First Amendment, as made applicable to States and municipalities by the Fourteenth, forbids the institution of civil or criminal proceedings against the film "I Am Curious (Yellow)" because there is outstanding, with respect to that film, a final judgment binding against the United States which holds that the film is not without redeeming social value

and that its showing, therefore, constitutes free expression protected by the First Amendment.

We emphasize, at the outset, that our argument is not simply a matter of *res judicata* or collateral estoppel. We are not arguing, in other words, that State governments are bound as parties or privies by the ruling of the United States Court of Appeals for the Second Circuit. What we are saying is: (1) that in the realm of free expression, it would be impermissibly stifling and inhibitive if State and local governments could subject the same protected activity to repeated litigation, and (2) that to give free speech the "breathing space" it requires, a judgment of a federal court, binding forever on the United States as a party, that a particular work is not obscene and is, rather, within the area protected by the Free Speech guarantee, precludes sanctions—or even the threat of sanction—by State or local government.

The relevant facts in this case are as follows:

1. The United States, acting through the United States Attorney for the Southern District of New York, instituted in 1968 an action under 19 U.S.C. 1305 to forfeit and confiscate as obscene the film "I Am Curious (Yellow)" upon its importation from Sweden.

2. The District Court denied a motion for summary judgment filed by Grove Press, Inc., as claimant. 285 F.Supp. 465. After trial before a jury, a judgment ordering forfeiture and confiscation was entered by the District Court.

3. On appeal to the United States Court of Appeals for the Second Circuit, the judgment was reversed. 404 F.2d 196. The opinion for a majority of the court

(per Hays, J.) stated that the film "cannot be classified as obscene on at least two of the three grounds. . . ." (*id.* at 199) set out in the Supreme Court's opinion in *Memoirs* v. *Attorney General*, 383 U.S. 413, 418 (1966). The majority opinion concluded that (404 F.2d at 199-200):

(a) "(I)t cannot be said that 'the dominant theme of the material taken as a whole appeals to a prurient interest in sex.' Whatever the dominant theme may be said to be . . . it is certainly not sex."

(b) "It is even more clear that 'I Am Curious' is not utterly without redeeming social value . . . it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically.

In a separate opinion, the concurring judge (Friendly, J.) relied solely on the standard of "redeeming social value." He concluded that (404 F. 2d at 201):

(a) "Judge Hays' opinion sufficiently' demonstrates the existence of the required modicum of social value here," and

(b) "While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting."

4. The United States did not seek a writ of certiorari from this Court.

A. The Unreviewed Conclusion of the Court of Appeals That "I Am Curious (Yellow)" Is Not Utterly Without Redeeming Social Value Finally and Conclusively Binds the United States in All Actions in Which It May Hereafter Be a Party.

Strictly as a matter of estoppel by judgment or "collateral estoppel" and *res judicata*, the United States is bound finally and conclusively by the decision of the Court of Appeals for the Second Circuit. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-403. (1940); *Cromwell* v. *County of Sac*, 94 U.S. 351. 1877); *United States* v. *One Obscene Book Entitled "Married Love,"* 48 F.2d 821 (S.D.N.Y. 1931). A majority of that Court has held that "I Am Curious (Yellow)", is not subject to seizure or suppression as obscene because it is not without redeeming social value. That conclusion—*i.e.*, that the film is within the protection of the First Amendment—is conclusive vis-a-vis the United States, which was an active litigant in the federal court, for all civil and criminal purposes. It would control, for example, if the United States were to seek to prosecute the mailing or transportation of the film under 18 U.S.C. 1461 or 1465.[39]

B. Multiplicity of Litigation Inhibits the Rights of Speech Protected by the First Amendment.

In recent years this Court has made repeated reference in various contexts to the importance of leaving "breathing space" for the exercise of the constitutionally protected rights of free speech. *NAACP* v.

[39] Of course, as Judge Friendly noted, factors other than the obscenity of the film might bear upon criminal or civil proceedings under *either Ginzburg* v. *United States*, 383 U.S. 463 (1966), on *Ginsberg* v. *New York*, 390 U.S. 629 (1968). See 404 F.2d at 202.

Button, 371 U.S. 415, 433 (1963). That doctrine has been applied, for example, in establishing the constitutional rule that libel actions brought by public officials against critics of their official conduct may be successfully maintained only on proof of actual malice. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 271-272 (1964). It was also relied on by the Court in holding that vaguely-phrased loyalty oaths could not withstand constitutional attack. *Baggett* v. *Bullitt,* 377 U.S. 360, 371-373, (1964). And it is the foundation for the extraordinary remedy of intervention in State-court proceedings established by the decisions in *Dombrowski* v. *Pfister,* 380 U.S. 479, 475-488 (1965), and *Zwickler* v. *Koota,* 389 U.S. 241, 249-252 (1967).

In each of the above instances, the concern expressed by the Court was not merely that the individual or group exercising First Amendment rights might be punished or prevented by judicial decree from engaging in constitutionally protected activity. In each case the Court laid down a constitutional rule which went well beyond that narrow sphere. For, as the Court explained in *NAACP* v. *Button,* 371 U.S. 415, 433 (1963), there is great harm to First Amendment freedoms whenever governmental authority is even susceptible of sweeping and improper application:

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. *The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.* (Emphasis added.)

In the area involved in this case—*i.e.,* the regulation of obscenity—this doctrine was applied as early as *Smith* v. *California,* 361 U.S. 147 (1960), where the

Court held unanimously that a bookseller could not constitutionally be convicted of offering obscene books for sale without proof of scienter or *mens rea*. The Court's reasoning, quoted here, is—as we show *infra*—fully applicable to this case (361 U.S. at 153-154):

> For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted . . . The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

Essentially the same rationale was applied by this Court in 1968, in striking down as unconstitutionally vague the Dallas, Texas, film licensing ordinance. In *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 683-684 (1968), the Court said:

> It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. . . . Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposed to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance

> means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run the risk, he might choose nothing but the innocuous. . . .

The harm to First Amendment rights presented by even the threat of governmental litigation was cogently summarized by the Court in the *Dombrowski* case (380 U.S. at 486, 487):

> The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases [involving First Amendment freedoms]. . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

The practical impact of a rule that permits local jurisdictions to proceed civilly or criminally against a film which has been found to be protected by the First Amendment is graphically demonstrated by the experience of "I Am Curious (Yellow)." Notwithstanding the decision of the Second Circuit, the film has been the subject of 144 civil or criminal actions.[40] The consequence of these proceedings has been to impose extremely heavy burdens on the distribution of the film in terms of costs of litigation and unwarranted delays in exhibition.

Here, as in the *Interstate Circuit* case, a distributor would be assuming staggering financial and personal consequences to undertake such a similar project. Notwithstanding unequivocal steps to keep within the Su-

[40] A list of the actions concerning "I Am Curious (Yellow)" appears in Appendix A, pp. 1a-5a, *infra*.

preme Court's *Ginzburg* and *Ginsberg* decisions, *supra*, this film—which Judge Hays found to be a "story of a young girl who is trying to work out her relationship to such political, social, and economic problems as the possibility of a classless society, the acceptance of the Franco regime, and the policy and practice of non-violence" (404 F. 2d at 198) and was found to have social value by the testimony of 13 experts in the United States District Court—has been the subject of repeated harassment by local officials. If all future films must run this gamut, distributors will pick only the least innovative and most bland.

C. To Safeguard First Amendment Rights, States And Local Jurisdictions Should Not Be Permitted To Proceed On A Charge Of Obscenity Against Material Which Has Been Finally Determined In A Federal Court To Be Legitimate And Protected Free Expression.

We have demonstrated above that repeated and multiplicitous litigation against a book or film on a charge of obscenity carries the very same constitutional vice as overbroad enforcement powers and vague statutory standards. In all such instances, publishers and booksellers, producers and exhibitors, as well as distributors of books and films must necessarily be inhibited in their conduct.

Yet we recognize—as the courts have done time and again—that there is a legitimate and constitutionally permissible interest that governmental agencies possess in supervising and regulating commercial traffic in obscene matter. A system of censorship, as well as the authority to prosecute criminally those who deal in obscenity, has some inhibiting effect on legitimate free expression; but that effect has not been thought suf-

ficient to render a carefully limited censorship system constitutionally infirm *per se* or to prevent the application of criminal obscenity laws and ordinances. *E.g.*, *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

What must be kept always in mind, however, is that the State's legitimate interest does not extend beyond a procedure which will result in "the separation of legitimate from illegitimate speech . . ." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). For, as this Court noted in the *Times Film* case, the warrant for a film censorship procedure is only the asserted "duty to protect . . . people against the dangers of obscenity in the public exhibition of motion pictures." 365 U.S. at 49. If it is once determined, with respect to any particular film, that it is "legitimate . . . speech" rather than obscenity, there is no longer any justification for governmental action with respect to it.

In this case, the federal government has actively and energetically litigated the obscenity *vel non* of "I Am Curious (Yellow)." A federal court has held it to be "legitimate speech," constitutionally immune from governmental regulation under the national laws respecting obscenity. That conclusion, which is now final and binding on the United States, should foreclose any local proceedings again raising the issue of obscenity.

To be sure, no State or municipality was a party to the action in the District Court or Court of Appeals. Nor could any State or municipality seek to obtain review in this Court of the Second Circuit decision. But, in the area of constitutional liberties, it is not unusual for States and local jurisdictions to be fore-

closed because of actions taken in federal court in proceedings in which they did not participate.

(1) One obvious illustration is the principle of *Rea v. United States*, 350 U.S. 214 (1956), under which decisions of federal courts regarding the constitutionality of searches and seizures by federal agents may effectively limit the use of such agents' testimony in State courts. It was not suggested in *Rea*—notwithstanding the fact that that case was decided before *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963)—that the State courts should be entitled to re-examine the constitutionality of the search and seizure because the State prosecutor was not a party to the original hearing at which the mixed questions of constitutional law and fact were decided. See also *Lucas v. Mayo*, 222 F. Supp. 513 (S.D. Tex. 1963). And even in *Cleary v. Bolger*, 374 U.S. 392 (1963), where the issue concerned the prospective testimony of a *State* officer in a State proceeding, this Court's reason for refusing to permit an injunction by the federal district court was the well-established reluctance to interfere by injunction in State proceedings. Cf. *Stefanelli v. Minard*, 342 U.S. 117 (1951). (That factor is, of course, substantially weaker in the First Amendment context. See *Dombrowski v. Pfister*, *supra*.) The Court appeared to assume that the ruling of the federal court would be followed in the State proceedings—and that a remedy would ultimately be available in this Court if it were not. See 371 U.S. at 400-401.

(2) Another area where States may be foreclosed by what is done in a federal court or under federal judicial authority is illustrated by *Adams v. Maryland*, 347 U.S. 179 (1954), and *Murphy v. Waterfront Com-*

mission, 378 U.S. 52 (1964). Under these decisions, testimony obtained by federal authorities under compulsion, with an appropriate statutory provision for immunity, will foreclose State use of such testimony or its fruits—notwithstanding the absence of any consultation or representation by the State.[41] Prior to the *Murphy* decision, such a result might have been thought to follow only—as in *Adams*—where a federal statute so provided. The constitutional rule announced in Murphy, however (378 U.S. at 79), makes it plain that—as a matter of constitutional law—a federal grant of immunity is controlling on the State prosecutor.

(3) A third illustration of an area in which federal action may foreclose State and local jurisdictions notwithstanding the absence of collateral estoppel or *res judicata* is the application of the Fifth Amendment's double jeopardy provision to a State prosecution which follows on the heels of an unsuccessful (or successful) federal prosecution for what is essentially the same offense.

In *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the Court considered that situation and held that the State might permissibly proceed notwithstanding the federal acquittal because, under *Palko* v. *Connecticut*, 302 U.S. 319 (1937), the State was not constitutionally bound by the Fifth Amendment's prohibition against double jeopardy. That reasoning—which was the exclusive basis for affirming the Illinois conviction in *Bartkus*—is, of course, inapplicable today as a result of this Court's overruling of *Palko* in *Benton* v. *Maryland*, 395 U.S. 784 (1969).

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[41] The same is, of course, true under the *Murphy* case if immunity is granted by State officials and the federal government then seeks to use the evidence or its fruits.

It follows from the *Benton* decision that an unsuccessful federal prosecution will henceforth foreclose a State prosecution on essentially the same charge—notwithstanding the fact that the State did not participate and is not technically bound as a matter of *res judicata* or estoppel by judgment by the federal action. See also *Ashe v. Swenson*, 90 S. Ct. 1189 (1970); cf. *Waller v. Florida*, 90 S. Ct. 1184 (1970).

In such an instance, the State would be foreclosed because of the constitutional mandate that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." In the present case, there is an analagous constitutional rule—the broad proscription of the First Amendment against abridgment of the freedom of speech. We have demonstrated amply above that the First Amendment guarantee requires that constitutional protection be afforded against repeated and harrassing proceedings involving material which has been judicially determined to be within the range of "legitimate speech." A prohibition against local obscenity actions in these circumstances is the means for achieving this objective.

Our argument, in summary, is that whenever the national government is bound by a judicial determination that a film is not obscene, the First Amendment will not tolerate local actions relitigating the issue of obscenity. We do not reach—and need not reach—the question presented by the reverse set of facts—*i.e.*, whether a similar conclusive judicial determination in a *State* court forecloses federal action or proceedings in other States. Obviously, there are substantial legal distinctions between such a case and the one presented here. Suffice it to say that when the decision is that of a federal court, in an action binding the United States, the adjudicated breadth of conduct deemed protected is greater (*e.g.*, the material can be mailed inter-

state by private parties) and there is more likelihood of correct constitutional decisions. Moreover, a constitutional rule of this kind would encourage the supporters and detractors of a particular film or book to focus their attention and efforts on a single lawsuit—to which all interested parties might become *amici* or parties—thereby reducing unnecessary duplication and expense. A federal court is obviously a more satisfactory forum for such a proceeding.

We also note in conclusion that while our argument does not depend on the mooted issued whether there is a single national standard of obscenity (see, *e.g.*, *Jacobellis* v. *Ohio*, 378 U.S. 184, 191-196 (1964)), the acceptance of such a rule would make the adoption of our proposed constitutional principle a necessity. For if there is, indeed, a single national standard, the decision of a federal court—which binds the entire nation insofar as it affects interstate mailings and transportation—should surely prevail over the potential rulings of a local court. The application of First Amendment guarantees regarding motion pictures requires that such a "national ruling" bar subsequent re-evaluations by local judges and juries.

IV.

THE EXHIBITION OF "I AM CURIOUS (YELLOW)" IN PRIVATE MOTION PICTURE THEATERS FROM WHICH MINORS ARE EXCLUDED IS CONSTITUTIONALLY PROTECTED UNDER THIS COURT'S DECISION IN STANLEY v. GEORGIA

In *Stanley* v. *Georgia*, 394 U.S. 557 (1969), this Court recognized that the First Amendment protects possession of even concededly obscene material to the extent that any government interference would amount to "telling a man, sitting in his own house . . . what films he may watch." The opinion in *Stanley* held explicitly that the First Amendment (as contrasted with the Fourth, on which these concurring Justices re-

lied) secured to an adult "the right to receive information and ideas" (394 U.S. at 564), "the right to read or observe what he pleases" (394 U.S. at 565), "the right to satisfy his intellectual and emotional needs in the privacy of his own home" (394 U.S. at 565), and "the right to be free from state inquiry into the contents of his library" (394 U.S. at 565).

There can be no question, therefore, that under *Stanley* any adult Maryland resident has a First Amendment right to exhibit or use a print of "I Am Curious (Yellow)" in his home irrespective of any determination regarding its alleged obscenity. We submit that there is no rational basis for distinguishing between an adult's viewing of the film alone in his house and his viewing it in the company of other willing adults in a private movie theatre from which minors are excluded. Chief Judge Aldrich, speaking for the majority of a three-judge district court in *Karalexis* v. *Byrne*, 306 F. Supp. 1363, 1367 (D. Mass. 1969), *appeal pending*, No. 83, this Term, correctly concluded: "If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library."

To be sure, the Court noted in *Stanley* that private possession in the home poses little "danger" that "it might intrude on the sensibilities or privacy of the general public," or that it "might fall into the hands of children." But a film may be exhibited at a theater in a manner that assures no intrusion on sensibilities of unwilling members of the public and no admittance of children. Indeed, the record made below and the representations made in the United States District Court in the customs case leave no room for doubt that the distributor of this film has taken full precautions to exclude minors and to advise the public of the nature of the film (without, of course, engaging in any

"pandering"). Hence suppression of the film achieves no other legitimate governmental objective than the suppression attempted in *Stanley*.

The limited nature of the legitimate governmental interests in regulating obscenity emerge from an analysis of *Stanley* in light of its antecedents, especially *Ginzburg* v. *United States*, 383 U.S. 463 (1966), and *Redrup* v. *New York*, 383 U.S. 767 (1967).

In *Ginzburg*, the Court upheld a conviction for distributing material which it "assumed" could not "be adjudged obscene in the abstract." 383 U.S. at 474. The distribution was punished because it was pandered; it was distributed in a manner that "would tend to force public confrontation with the potentially offensive aspect of the work. . . ." *Id.* at 470. The clear implication of that decision is that if the same material were presented in a non-pandering manner so as not to force public confrontation, it would have been protected. Indeed, the Court said that the *Ginzburg* conviction "does not necessarily suppress the materials in question . . ." *Id.* at 475.

In *Redrup*, the Court reaffirmed this approach to obscenity. In reversing the convictions, the Court said:

> In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince* vs. *Commonwealth of Mass.*, 321 U.S. 158; cf. *Butler* vs. *State of Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Beard* vs. *City of Alexandria*, 341 U.S. 622, *Public Utilities Comm'n of District of Columbia* vs. *Pollak*, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg* vs. *United States*, 383 U.S. 463.

The Maryland statute under which "I Am Curious (Yellow)" was banned in this case does not reflect a limited concern for juveniles. See also *Ginsberg* v. *New York* 350, U.S. 629 (1968). It does not focus on any "assault"; nor does it require "pandering".

In this case, the State of Maryland has banned all exhibition of the film "I Am Curious (Yellow)" including exhibition under conditions presenting no danger of intrusion or access to children. The decision of the Maryland Supreme Court cannot be logically reconciled with *Stanley*.

The principle articulated in *Stanley* simply cannot be limited to the home; it must be applied to all "controlled" locations which are private in the sense that no unwilling person is required to see the allegedly obscene material.

This approach is not only required by the principle underlying *Stanley;* it is also the most sensible and appropriate approach to the role of this Court in the area of obscenity. It would relieve the Court of its present obligation to read every book and view every film declared obscene by a lower court. Instead the Court could set out objective, external standards. The Court's concern would be not with what is going on *inside the theater (where the only persons exposed to* the film are willing patrons), but rather with what is going on *outside* it (where the general public is exposed to the billboard or other advertisements). Lower courts could then easily follow the guidelines set down by this Court, without the need for review in every case.

This approach to obscenity—that its regulation be similar to that effected for any "nuisance"—is one which has been favored by legal scholars for some

time. Commenting on the *Stanley* decision, one scholar recently put the principle as follows: "Obscenity is vested with constitutional protection subject to divestment upon a finding of distribution to minors or exposure to an unwilling (captive) audience." Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 Supreme Court Review, 203, 217 (1969).[42]

[42] See also Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185, 229, 232 (1969):

> ". . . [T]he state may not enact legislation which has as an objective the protection of adults from themselves."
>
> ". . . it seems impossible to justify recognition of a legitimate state interest in protecting the citizen's sensibilities with regard to sexual expression, just as such an interest cannot be justified when religious or political expression is at issue."

Morreale, *Obscenity: An Analysis and Statutory Proposal*, 2 Wisc. L. Rev. 421, 455 (1969):

> ". . . The only clearly legitimate interest a state can protect by censorship of obscene representations to adults, is the interest of persons to avoid unwilling confrontation with obtrusive, obscene representations."

Elison and Graham, *Obscenity: A Compromise Proposal*, 30 Mont. L. Rev. 123, 133, 134 (1969):

> "Any material, reprodnction, object of art or what have you should be available for purchase by the adult population *with the only* restriction being that it cannot be forced upon them."
>
> "Adults who wish to be exposed to offensive material may risk corrupting themselves. This is a minor concession to free speech and to a more practical solution to the problem of morally offensive material."

The Supreme Court, 1968, 83 Harv. L. Rev. 147, 153 (1969):

> [Obscenity may be banned] "only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake. . . . In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will."

Recent lower-court State and federal decisions have followed a similar approach to *Stanley*. See, *e.g.*, *United States v. Thirty-Seven Photographs*, 309 F. Supp. 36 (C.D. Cal. 1970);[13] cf. *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *appeal pending*, No. 41, this Term; *California v. Lerens*, Munic. Ct., Fresno Judicial District, Calif., Nos. 40,000 and 40,415 (February 4, 1970) (alternative holding); *State v. Scott* (Dist. Ct. Texas.), 6 Cr. L. Rep. 2423.

Under the above analysis, the Maryland Board of Censors may not prevent the "controlled" exhibition of *any* film, no matter how plainly obscene it is, even if it constitutes "hard-core pornography." We submit that that is the proper and desirable constitutional role. But assuming, *arguendo*, that this Court does not agree that patently obscene material is entitled to such protection, we submit that *Stanley* means *at least* that the circumstances of dissemination of a film or book are relevant factors in judging an allegation of obscenity leveled at a work that is not "hard-core pornography." Just as sale and distribution in a salacious or "pandering" manner may tip the scales *against* borderline material, so should limited distribution, control against exhibition to minors and re-

[13] In *Thirty-Seven Photographs*, the court determined that 19 U.S.C. 1305 was unconstitutional as applied to the importer of 37 photographs for incorporation "in a book for distribution." The court held that the statute "prohibits a person who may constitutionally view pictures of [*sic*] the right to receive them." 309 F. Supp. at 38. In reasoning paralleling that of the court in *Karalexis v. Byrne*, *supra*, it said: "The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent." *Ibid.*

strained advertising result, under the theory of *Stanley* and *Redrup*, in a finding of nonobscenity. When a film is exhibited to adults only in a non-pandering manner so as not to intrude on the privacy of unwilling viewers, all doubts about its obscenity *vel non* must be resolved in favor of its constitutional protection. In *Ginzburg*, the Court held that the evidence relating to the manner in which the material was distributed "was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt." 383 U.S. at 470. The *Ginzburg* rule cannot be a one-way street. Where the material is—or will be—presented in a manner so as not to "force public confrontation with the potentially offensive aspects of the work" (*id.* at 490), then materials which might be regarded as obscene if pandered, should be deemed protected.

Accordingly, if the Court does not accept the argument that *Stanley* precludes *all* censorship in a controlled theater, we propose the following simple test: Any material other than "hard-core pornography" may be exhibited to adults in a theater so long as the exhibitors have sufficiently indicated to the viewing public the possible offensiveness of the film, it is not advertised in a pandering manner and the theater is policed, so that no minors are permitted to enter. We have amply demonstrated in the earlier portions of our Argument (pp. 29-32, *supra*) that "I Am Curious (Yellow)" is not hard core pornography. The decision of the court below, upholding a blanket denial of permission to exhibit the film is, therefore, erroneous and must be reversed.

V.

BY REFUSING TO DIVULGE THE NAMES OF EXPERTS CONSULTED BY THE BOARD OF CENSORS, APPELLEES DEPRIVED THE DISTRIBUTOR AND EXHIBITOR OF THE FILM OF RIGHTS SECURED BY THE DUE PROCESS CLAUSE

At the trial below appellants requested the names of experts who had been consulted by the Board of Censors during its consideration of the alleged obscenity of "I Am Curious (Yellow)." It was believed by the appellants that at least some of these experts had reached favorable conclusions regarding the film and if their names were known they might be available to testify at the trial in support of the film.

The request for disclosure was refused by the State, and the refusal was sustained by the trial court (J.A. 27, 243). This was error of constitutional dimension. The general principle applicable in criminal cases that "'suppression of evidence favorable' to the accused [is] itself sufficient to amount to a denial of due process" (*Brady* v. *Maryland*, 373 U.S. 83, 104 (1963); see also *Giles* v. *Maryland*, 386 U.S. 66 (1967)) should apply as well, when First Amendment freedoms are at stake. The State should not be permitted, in such circumstances, to keep from the party asserting a First Amendment right the name of a prospective witness who could help support the claim that free expression is at stake. In *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1967), the Court of Appeals for the Fourth Circuit held that reports of expert witnesses are covered by the *Brady* principle, and the same rationale applies, we submit to prospective expert testimony. Moreover, even if this Court were to limit the *Brady* principle to criminal cases, it should apply here. The consequence of the ruling of the Board of Censors is to suppress the film in Maryland—the equivalent of a seizure of the print. Hence the proceeding is "quasi-criminal

in character." *One 1968 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). In addition, the finding of obscenity concludes the issue for future criminal prosecutions; if the exhibitor were to show the film after its rejection by the Board of Censors, he could not defend against a criminal prosecution under the Maryland statute on the ground that the film is not obscene. Consequently, the effect of the decision in this "civil" case is to foreclose the litigation of an essential element in a future criminal prosecution. The State of Maryland should not be permitted to take this step without satisfying the constitutional standards prescribed for criminal prosecutions.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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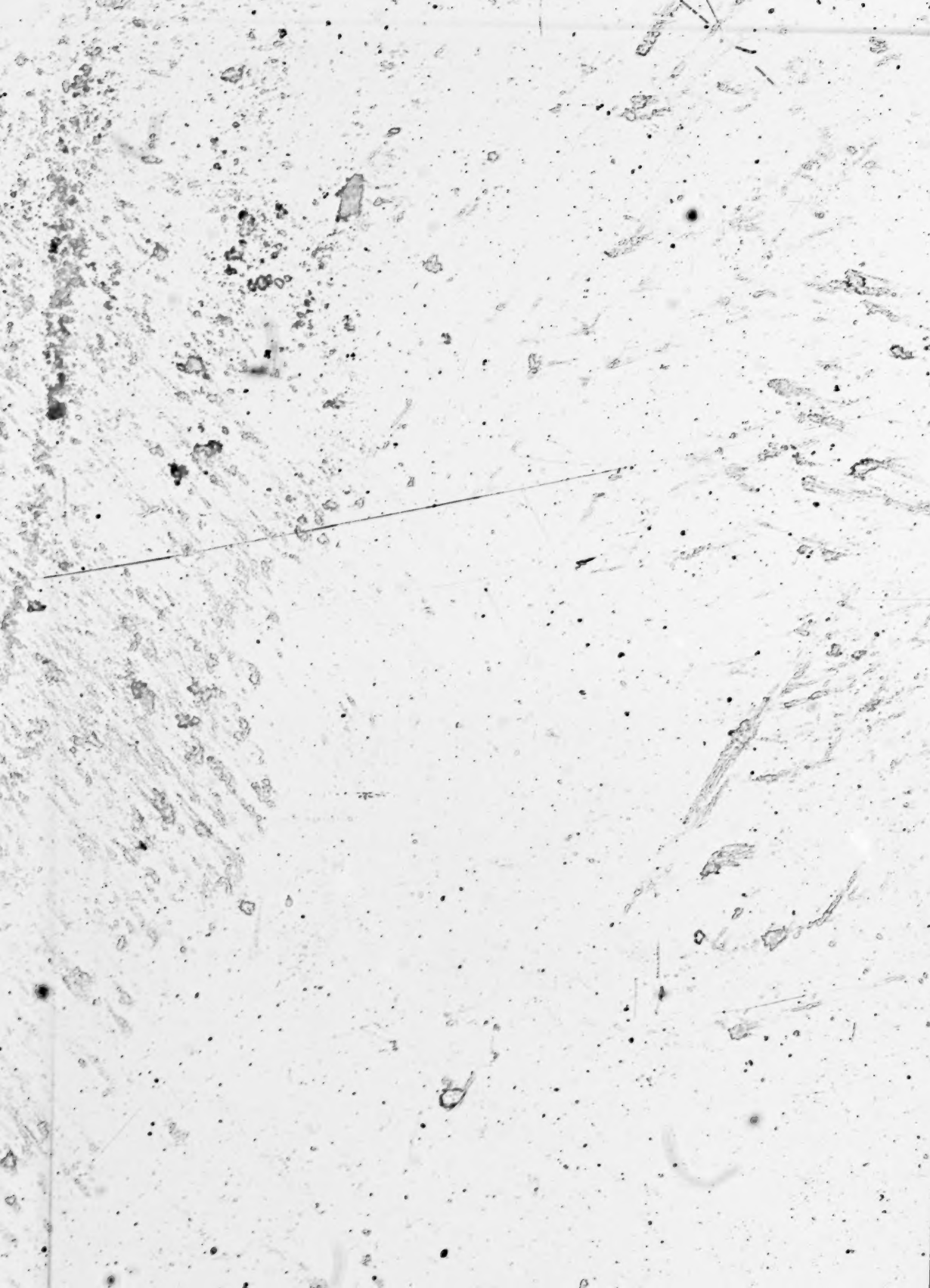

APPENDIX A

ALABAMA

(Birmingham)—*Grove Press, Inc.* v. *Melvin Bailey*, No. 69-770, (U.S. District Court for the Northern District of Alabama, Southern Division)

(Birmingham)—*Kathryn C. Cooper* v. *Melvin Bailey*, No. 24924, (Circuit Court, 10th Judicial Circuit of Alabama, Bessemer Division)

ARIZONA

(Phoenix)—*Grove Press, Inc.* v. *John Mummert Etc., Et Al*, No. Civil 69-503 Phoenix, (U.S. District Court for Arizona)

(Phoenix)—*National General Corp.* v. *Mummert*, (Superior Court in and for Maricopa County, Arizona)

CALIFORNIA

(Los Angeles)—*People of the State of California* v. *Beverly Pictures, Inc.*, No. M-102552, (Municipal Court of South Bay Judicial District County of Los Angeles, California)

(Los Angeles)—*People* v. *Harry Baffo, Et Al*, Nos. 32982, 33080, 33088, (Municipal Court of Glendale Judicial District, Los Angeles County)

(Los Angeles)—*People* v. *Robert Fishman, Et Al*, (Municipal Court of Inglewood Judicial District, Los Angeles County)

(Los Angeles)—*People* v. *John Murki*, (Municipal Court of Los Angeles Judicial District, Los Angeles County)

(Los Angeles)—*People* v. *Robert Towers*, No. 351,948, (Municipal Court of Los Angeles Judicial District, Los Angeles County)

(Los Angeles)—*Grove Press, Inc.* v. *Evelle J. Younger, Et Al*, No. 69-2554-FW (U.S. District Court Central District of California)

(Los Angeles, CDL)—*John Harmer* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)"*, No. 967070, (Superior Court of State of California for the County of Los Angeles)

(Merced County)—*Grove Press, Inc.* v. *Thomas C. Lynch, Et Al*, No. F-383-Civil, (U.S. District Court Eastern Division of California)

(Merced County)—*People* v. *Ralph St. Onge*, No. 45530, (Municipal Court for Merced County Judicial District, California)

(Orange County)—*People* v. *William Alfred & Eleanor Blackburn*, No. M-53307 (Municipal Court of Orange County Harbor Judicial District, Orange County)

(San Jose)—*People* v. *Shaw International Theatres, Inc.*, No. 13024-A (Municipal Court for San Jose-Milpitas Judicial District, Santa Clara County)

(San Jose)—*Grove Press, Inc.* v. *Louis P. Bergna, Et Al*, No. 52300 (U.S. District Court Northern District of California)

COLORADO

(Denver)—*Grove Press, Inc.* v. *The State of Colorado, Et Al*, No. C-1677, (U.S. District Court for the District of Colorado)

(Denver)—*People of State of Colorado* v. *Sher Enterprises, Inc.*, No. C-12226, (District Court in and for the City and County of Denver)

GEORGIA

(Atlanta)—*Grove Press* v. *Lewis R. Slaton, Et Al*, No. 13040, (U.S. District Court, Northern District of Georgia, Atlanta Division)

KANSAS

(Kansas City)—*Kansas* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)"*, No. 6122 (District Court of Johnson County, Kansas)

(Kansas City)—*Grove Press, Inc.* v. *State of Kansas, Et Al, Lake Side Drive-In Theatre, Inc.* v. *Francis D. Menghini*, No. KC-2992 & No. 2997, (U.S. District Court for the District of Kansas)

MARYLAND

(Baltimore)—*Howard Wagonheim, Et Al* v. *Maryland State Board of Censors*, No. 212 (Court of Appeals of Maryland)

MASSACHUSETTS

(Boston)—*Commonwealth of Massachusetts* v. *Serafim Karalexis, Et Al*, Nos. 43068-69-70-71, (Superior Court of Suffolk)

(Boston)—*Serafim Karalexis, Et Al* v. *Garret H. Byrne*, No. 69-665-J, (U.S. District Court for the District of Massachusetts)

MICHIGAN

(Ann Arbor)—*William F. Delhey* v. *Fifth Forum & Grove*, No. 4711 Circuit Court, C.C.A. No. 9069, (Circuit Court Washtenaw County)

(Detroit)—*Grove Press, Inc.* v. *Robert B. Blackwell*, No. 33369, (U.S. District Court Eastern District of Michigan, Southern Division)

MISSOURI

(Kansas City)—*Grove Press, Inc.* v. *Herbert Hoffman & Honorable John H. Lucas*, No. 17787-4 Civil Action (U.S. District Court for Western District of Missouri Western Division)

(Kansas City)—*Herbert Hoffman* v. *Dickinson Operating Co., Inc., Et Al*, No. 730,169 (Circuit Court of Jackson County, Missouri)

NEW HAMPSHIRE

(Derry)—*Cinema Enterprises of New Hampshire, Et Al* v. *State of New Hampshire*, Civil 3109 (Derry District Court)

(Derry)—*State of New Hampshire* v. *Donald Critchley, Et Al*, (Rockingham County Superior Court)

(Derry)—*Cinema Enterprises of New Hampshire, Inc., & Donald Critchley* v. *Warren B. Redman, Attorney General of New Hampshire, Et Al*, Civil 3096 (U.S. District Court for District of New Hampshire)

NEW JERSEY

(Livingston)—*Joseph P. Lordi, Prosecutor* v. *United Artists Corp., Et Al*, No. C-787-69 (Superior Court Chancery Division, Essex County)

(Linden)—*Leo Kaplowitz, Prosecutor* v. *Wood Plaza Theatres, Corp., Et Al*, No. C-829-69 (Superior Court Chancery Division, Union County)

(Woodbridge)—*Edward J. Dolan, Prosecutor* v. *United Artists Corp., Et Al*, No. C-813-69 (Superior Court Chancery Division, Middlesex County)

NEW MEXICO

(Albuquerque)—*Grove Press, Inc., Et Al* v. *City of Albuquerque, Et Al*, No. 8177 (U.S. District Court for the District of New Mexico)

(Albuquerque)—*City of Albuquerque* v. *Tom Singleton*, No. P412-9H7675 (Municipal Court City of Albuquerque)

NORTH CAROLINA

(Greensboro)—*State of North Carolina* v. *Halsey Melonie*, No. CR28,000 (General Court of Justice District Court Division Guilford County)

OHIO

(Cleveland)—*Grove Press, Inc., Et Al* v. *John T. Corrigan, Et Al*, No. 877845 (Civil Branch, Cuyahoga County Court of Common Pleas)

(Cleveland)—*State of Ohio* v. *Dave Browdie*, No. 93748 (Criminal Branch, Cuyahoga County Court of Common Pleas)

(Youngstown)—*State of Ohio* v. *Cecil Cook*, (Criminal Branch Mahoning County, Court of Common Pleas)

(Youngstown)—*Grove Press, Inc., Et Al* v. *Anthony B. Flask, Et Al*, No. C69-735 (U.S. District Court for the Northern District of Ohio, Eastern Division)

(Youngstown)—*State of Ohio* v. *Charles Hamm*, (Criminal Branch Mahoning County, Court of Common Pleas)

(Youngstown)—*State of Ohio, Ex Rel Vincent E. Gilmartin, Et Al* v. *State-Youngstown Theatre Corp.*, (Civil Branch Mahoning County Court of Common Pleas)

PENNSYLVANIA

(Edwardsville)—*Commonwealth of Pennsylvania* v. *Grove Press, Inc.*, No. 18 (Court of Common Pleas of Luzerne County, Civil Equity)

(Philadelphia)—*Grove Press, Inc.* v. *City of Philadelphia*, No. 69-972 *City of Philadelphia* v. *19th & Chestnut Street Corp., Et Al*, No. 69-934 (U.S. District Court for the Eastern District of Pennsylvania)

VIRGINIA

(Norfolk and Virginia Beach)—*Grove Press, Inc., Et Al* v. *Andre Evans, Et Al*, No. 355-69-N (U.S. District Court for the Eastern District of Virginia, Norfolk Division)

Commonwealth of Virginia v. *Kenneth Andrews*, (Municipal Court of City of Virginia Beach)

WASHINGTON

(Spokane)—*State of Washington* v. *National General Theatres, Inc.*, No. 194766 (Superior Court of the State of Washington in and for the County of Spokane)

(Spokane)—*State of Washington* v. *National General Theatres, Inc.*, No. 9377 (Superior Court of the State of Washington in and for the County of Spokane)

(Spokane)—*Grove Press, Inc.* v. *Donald C. Brockett, Et Al*, No. 3300 (U.S. District Court Eastern District of Washington, Northern Division)

APPENDIX B

NEWSPAPERS

Akron Beacon Journal, Arnold, Gary, "Beware: Buildup to Letdown", May 14, 1969

Baltimore Evening Sun, Cedrone, L., "Review", July 21, 1969

Baltimore News American, Childress, Anne, "Gable's Famous 'Damn' Cued Profane Trend", April 1, 1969

Boston Herald Traveler, Maloney, A., "Review", May 28, 1969

Chelsea Clinton News, Glatzer, Robert, "I am Curious-Metaphors of Sweden", March 27, 1969

Columbus Citizen Journal, Gerrard, G., "Review", July 4, 1969

Des Moines Register, Aarons, Leroy F., "'I am Curious' Not Very Sexy, Voyeurs Warned", March 20, 1969

Detroit Free Press, Stark, S., "Review", June 22, 1969

Detroit News, Greene, Doc, "Glut of Smut", April 30, 1969

East Oregonian, Mahar, T., "Review", June 12, 1969

Fort Worth Morning Star Telegram, Champlin, Charles, "Nothing Movie Can't Show; 'I Am Curious' Proves It", June 21, 1969

Garden City, New Jersey Newsday, Kilpatrick, James L., "Where Do We Go From Here?", March 26, 1969

Hartford Times, Drew, Bernard L., "I Am Curious (Yellow)"—Graphic Not Porno", March 18, 1969

Hollywood Sun-Tattler, Primak, L., "Review", June 7, 1969

Kansas City Times, Fowler, G. M., "Review", June 21, 1969

Long Island Newsday, Gelmis, J., "Review", March 31, 1969

Los Angeles Herald Examiner, Blevins, Winifred, "'Curious' Immature Fun", May 23, 1969

Lowell Massachusetts Sun, Sarmento, William, "Boston Police Confiscate Swedish Film", May 12, 1969

Miami Beach Sun, Dana, G., "Are You Curious Or Yellow", June 1, 1969

Miami Herald, "Curiouser and Curiouser", May 31, 1969

Miami News, Kelly, H., "Review", June 3, 1969

Morning Telegraph, Mishkin, Leo, "Everyone's Curious (Yellow)", March 31, 1969

New York Leader, Simon, John, "Progress and Regression", March 31, 1969

New York News, Carrol, Kathleen, "'Curious' Is An Exercise in Tedium", March 11, 1969

New York Post, Winsten, A., "Review", March 11, 1969

New York Times, Simon, John, "Getting Furious Over 'Curious'", February 9, 1969

New York Times, Canby, Vincent, March 11, 1969

New York Times, Reed, R., "I Am Curious (No)", Sunday, March 23, 1969

New York Times, Weinraub, B., "Obscenity or Art", July 27, 1969

Norfolk Virginian Pilot, "A High-Priced Dive Into Shallow Water", May 28, 1969

N.Y.U. Heights Daily News, Young, Andrew, "Curious But Yellow", April 30, 1969

Oakland Tribune, Nachman, G., "Review", May 27, 1968

Patterson Morning News, Schaad, Jacob, "Six Barrier Falls In 'I Am Curious'", March 11, 1969

Philadelphia News, Oppenheimer, Judy, "So You're Curious", April 24, 1969

Portland Oregonian, Champlin, Charles, June 28, 1969

Providence Journal, Arnold, G., "Review", June 1, 1969

Quincy Manchester Patriot Ledger, Arnold, William, "It's Curiouser and Curiouser", April 2, 1969

Quincy Massachusetts Patroit Ledger, Liss, R. E., "Refreshingly Curiouser", May 10, 1969

Seattle Post Intelligencer, Stromberg, Ralph, "'Curious' Lacks Artistic Form", May 28, 1969

Seattle Times, Hartl, John, "Curious (Yellow)", May 27, 1969

St. Louis Post Dispatch, Wead, G., "Humor of the Erotic Seriousness", June 1, 1969

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Van Nuys Valley News, Wilson, Wayne, "I Am Curious (Yellow)", May 23, 1969

Washington Army Times, Greenwald, John, "Funny Bits Save Dum Dum Plots", May 21, 1969

Washington News, Berliner, Milton, "I Am Curious (Yellow)", April 1, 1969

Washington News, "Curiously Colorless", April 8, 1969

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Washington Star, MacArthur, "And You Could Be Furious (Livid)", April 1, 1969

Wichita-Kansas Beacon, Canby, Vincent, "Films Like 'I Am Curious'", March 2, 1969

PERIODICALS

Boston Christian Science Monitor, "The 'Curious' Case", April 16, 1969

Boxoffice, "I Am Curious (Yellow)", March 10, 1969

Cavalier, Abel, B., "Review", June, 1969

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Cue, Wolf, W., "Review", March 15, 1969

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Door To Liberation, Mahan, M., "Review", July 31, 1969

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Film Quarterly, Smith, C. B., "I Am Curious-Yellow and Blue", Vol. 22, No. 4 (1969)

Film World, Steele, R., "Esthetique du Mal" Spring, 1970

Friends Journal, Steele, R., "I Am Curious-Yellow", Vol. 15, No. 16 (1969)

Guardian, Silber, Irwin, "Quack, Quack, Quack All the Way", March 22, 1969

Harpers Bazaar, Trotta, G., "Review", June, 1969

Holiday, Matheson, R., "Review", December, 1968

Independent Film Journal, "I am Curious (Yellow)", March 18, 1969

Life, Schickel, R., "It Hides Nothing But the Heart"

Motion Picture Daily, Gertner, Richard, "I Am Curious (Yellow)", March 10, 1969

The Nation, Hatch, R., "Review", March 24, 1969

National Review, Corliss, R., "Film and Other Four Letter Words", July 29, 1969

The New Republic, Kauffman, S., "Review", March 15, 1969

Newsweek, Morgenstein, J., "Review", March 24, 1969, p. 114

New Yorker, Gilliat, Penelope, "Letter From the Flicks: Manhattan", April 5, 1969

Nightsounds, Becki, R., "Review", May, 1969

N.Y.U. Ticker, Leff, N., "Review", March 19, 1969

Pageant, McQuade, K., "Review", June, 1969

Pepper Pot, "Mood Yellow", June, 1969

Playboy, Williamson, Bruce, "I Am Curious (Yellow)", May 1969

Saturday Review, Alpert, Hollis, "On Being Curious-Twice", March 15, 1969

The Squire, "Review", June 19, 1969

Tempo, Cox, H., "Review", Vol. 1 No. 17 (1969)

Time, "Dubious Yellow", March 14, 1969

TV Radio Mirror, "Review", July, 1969

The Villager, Mayerson, Donald, "I Am Curious (Yellow)", March 13, 1969

Vogue, West, Anthony, "I Am Curious (Yellow)", April 15, 1969

FOREIGN REVIEWS

Afronbladet, Stockholm, "I Am Curious (Yellow)", October 10, 1967

Berlingske Tidende, Copenhagen, "I Am Curious (Yellow)", December 12, 1967

Chatelaine, Toronto, Ontario, Canada, "I Am Curious (Yellow)", July 1969

Expressen, Stockholm, "I Am Curious (Yellow)"

Fib-Aktuellt, Stockholm, "I Am Curious (Yellow)", No. 43, 1967

Helsingborgs Dagbladet, Halsingbord, "I Am Curious (Yellow)", October 17, 1967

Idrottsbladet, Stockholm, "I Am Curious (Yellow)", October 11, 1967

Les Courier des Etats-Unis, "Je Suis Curieuse", March 20, 1969

London Financial Times, "Douceure de Vivre", March 7, 1969

Politiken, Copenhagen, "I Am Curious (Yellow)", December 12, 1967

Sydsvenska Dagbladet, Malmo, "I Am Curious (Yellow)", October 17, 1967

Vancouver Columbian, "Hair and I Am Curious", April 14, 1969

Vi, Stockholm, "I Am Curious (Yellow)", No. 43, 1967

APPENDIX C

A Listing of Cities by State in Which "I Am Curious (Yellow)" Has Played or Is Currently Playing:

[number of weeks indicated in parens]

ALASKA
Anchorage (2)

ALABAMA
Birmingham (1)

ARIZONA
Phoenix (11)

CALIFORNIA
San Francisco (37)
Los Angeles (34)
San Diego (23)
Oakland (10)
San Mateo (10)
San Jose (24)
Monterrey (9)
Menlo Park (15)
Larkspur (8)
Davis (2)
San Bernardino (7)
Concord (6)
Sacramento (21)
Berkeley (19)
Riverside (15)
Balboa Beach (1)
Inglewood (2)
Glendale (8)
Hermosa Beach (8)
Long Beach (9)
North Hollywood (6)
Pasadena (5)
Stanton (1)
Tarzana (6)
Van Nuys (9)
Merced (5)
Petaluma (6)
Fresno (4)*

COLORADO
Denver (18)
Colorado Springs (6)
Pueblo (2)

CONNECTICUT
New Haven (13)
Hartford (14)
Norwich (3)
New London (5)
Bridgeport (6)
Stamford (6)
Waterbury (3)
Deep River (2)
Guilford (2)
Middletown (3)
Seymour (3)
Torrington (3)

FLORIDA
Miami Beach (18)
St. Petersburg (38)*
Palm Beach (9)
South Miami (19)*
Clearwater (17)*
Jacksonville (9)

GUAM
Agana (1)

HAWAII
Honolulu (10)

ILLINOIS
Chicago (27)*
Moline (4)*
Champaign (7)

* Denotes engagements still running as of 31 March 1970

INDIANA
Columbus (3)
Kokomo (4)

IOWA
Council Bluffs (5)

KANSAS
Overland Park (1)

MAINE
Waterville (4)
Portland (5)
Bangor (6)

MASSACHUSETTS
Boston (24)
Fall River (1)
Worcester (1)

MICHIGAN
Highland Park (29)*

MINNESOTA
Minneapolis (26)*

MISSOURI
Kansas City (5)

NEVADA
Las Vegas (7)
Reno (8)

NEW HAMPSHIRE
Somersworth (3)
Derry (4)*

NEW JERSEY
Trenton (5)
Newark (6)
Englewood (6)
Irvington (8)
Keyport (4)
Atlantic City (28)
Oaklyn (7)
Lakewood (11)
Hackensack (5)
Livingston (5)
Wayne (1)
Woodbridge (4)
Linden (6)
Bloomfield (3)
Jersey City (6)
Plainfield (3)
Atlantic Highlands (2)
Bogota (3)
Iselin (1)
Hightstown (2)
Blackwood (3)

NEW MEXICO
Albuquerque (12)

NEW YORK
Manhattan (47)
Brooklyn (11)
Bronx (11)
Queens (11)
Staten Island (12)
Long Island (11)
Dobbs Ferry (4)
White Plains (5)
Yonkers (5)
Peekskill (6)
Suffern (5)
Ossining (5)
Monticello (2)
White Lake (1)
Utica (9)
Woodbourne (4)
New Paltz (10)
Troy (6)
Buffalo (16)*
Cobleskill (1)
Rochester (14)
Syracuse (9)
Amsterdam (4)
Newburgh (2)
Glens Falls (3)

* Denotes engagements still running as of 31 March 1970

South Fallsburg (1)
Walden (1)
Binghamton (5)
Chester (2)
Catskill (3)
Poughkeepsie (3)
Harrison (2)
Warwick (2)
Nanuet (2)
Dover Plains (2)

NORTH CAROLINA
Durham (10)*
Greensboro (7)*
Asheville (1)*

OHIO
Columbus (21)
Cleveland (8)

OKLAHOMA
Oklahoma City (21)

OREGON
Portland (36)
Eugene (7)

PENNSYLVANIA
Philadelphia (21)
Hazelton (2)
Wilkes Barre (3)
Columbia (7)
Windber (4)
York (7)
Harrisburg (7)
Reading (7)
New Kensington (17)*
Scranton (3)

PUERTO RICO
Santurce (9)

RHODE ISLAND
Narragansett (3)
Providence (27)*

TEXAS
Lubbock (6)
Dallas (8)*
Houston (5)
San Antonio (3)
Austin (2)

VERMONT
Northfield (2)
St. Albans (2)
Burlington (4)
Rutland (2)
Bennington (2)

VIRGINIA
Norfolk (3)
Virginia Beach (10)

Washington, D. C. (52)*

WASHINGTON
Seattle (43)*
Tacoma (17)
Spokane (3)

WEST VIRGINIA
Logan (1)
Martinsburg (2)*

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* Denotes engagements still running as of 31 March 1970

APPENDIX D

EXPERTS WHO TESTIFIED IN SUPPORT OF "I AM CURIOUS (YELLOW)" AND THEIR CREDENTIALS

U. S. v. A Motion Picture Entitled "I Am Curious-Yellow", 196 F.2d 404, (U.S. Court of Appeals for Second Circuit)

STANLEY KAUFFMANN

—graduate of N.Y.U. College of Fine Arts with degree in Fine Arts
—honorary fellow of Moss College of Yale University
—visiting professor of drama at Yale School of Drama
—taught courses in theatre and film
—has been film critic for New Republic for 8 of last 10 years
—written film criticism for other magazines
—drama critic for *Times*
—views 125-175 films per year
—conducted T.V. shows
—chairman of National Society of Film Critics

PAUL ZIMMERMAN

—B.A. Amherst
—M.A. in English Literature from University of California at Berkeley
—M.A. journalism from Columbia
—film reviewer for Newsweek
—views 150 films per year

JOHN L. SIMON

—A.B., A.M., and PhD. from Harvard
—taught comparative Literature, English, Humanities at Harvard, M.I.T. and others
—film critic of New Leader
—drama critic for Hudson Review
—drama critic for Commonweal
—film critic for Horizon, Film Heritage
—contributor to Times, Vogue, Nation Time, etc.

—lectured on films
—written books on film
—written books on the arts
—working on book on films with Schickel

HOLLIS ALPERT

film critic for Saturday Review for 18 years
—fiction editor for New Yorker
author of book on essays on films *Dreams and Dreamers*
working on series of articles to be made a book on sex and the films
—written four novels
has lectured at several colleges
appears on panels, T.V. talk shows
—views 150-200 films per year

DR. HOWARD MOODY

—Senior Minister of the Judson Memorial Church in N.Y.C.
—seminary training at Yale Divinity School
—honorary doctorate from Kalamazoo College
—written for *Christian Century* and lay magazines
—wrote book *The Fourth Man* social criticism of contemporary American Culture
—on Borough President's Planning Board for Greenwich Village Church
—his church has drama theatre, dance theatre and art gallery

CHARLES WINNICK

—professor of Sociology at C.C.N.Y.
—licensed psychologist in New York
—M.A. and PhD. from N.Y.U.
—fellow of several professional societies
—consultant to U.S. Senate subcommittee on Juvenile Delinquency
—preparing paper for Sen. Javits Commission on Mental Health of Children

JAMES BEVERIDGE

—professor of films at Institute of Film and T.V., N.Y.U.
—film producer of educational and documentary films
—producer and executive producer with National Film Board of Canada
—director of North Carolina film board
—produced 150 documentaries
—consultant with UNESCO

TOM LEVIN

—assistant professor of psychiatry at Edison College of Medicine
—assistant professor of community health
—private practice in psychotherapy
—on faculty of National Psychological Association for Psychoanalysis
—member of several professional societies
—B.A., M.A., PhD.
—written articles on psychoanalysis

NED POLSKY

—associate professor of sociology at State University of N.Y.
—formerly associate editor of journal called *Social Problems*
—written book on pornography

NORMAN MAILER

—published ten books
—directed and acted in two motion picture films

SUSAN FIELDS

—instructor of English Literature at Catholic University
—cultural criticism for *Washington Free Press*

Joseph P. Lordi v. *Grove Press, Inc., et al*, No. C 787-69,
(Superior Court of New Jersey)

DR. DAVID ERNEST SCANLON

—assistant professor of drama and speech at Rutgers
—student of Swedish Drama

GERALD GARGIULO

—assistant professor of religious studies at Manhattan College
—practicing psychoanalyst in New York

PROFESSOR SOL WORTH

—associated with Annenberg School of Communications
—lecturer on films
—has produced films

DR. HENRY A. DAVIDSON

—psychiatrist
—former superintendent of psychiatric hospital

Grove Press, Inc. v. *Melvin Bailey, etc.*, Civ. Action 69-770,
(U.S. District Court for Northern Dist. Alabama)

DR. JAMES PAUL FRANKE

—PhD. in philosophy
—teaches philosophy at Birmingham Southern College
—member of Southern Society of Philosophy

DR. JOHN J. POOLE

—associate professor of English at Birmingham Southern
—PhD. of University of Alabama in English

DR. EMMETT PARKER (By Affidavit Only)

—PhD. in French Literature
—M.A. in French
associate professor at University of Alabama
—formerly taught at Wisconsin and Temple

ROY DRAYDON WELLS, JR. (By Affidavit Only)

—assistant professor of religion at Birmingham Southern College.

DR. SHERMAN C. RAFFEL (By Affidavit Only)

—consulting psychologist associated with University of Alabama Hospital

HARWELL G. DAVIS, JR.

—practising pathologist
—MD. degree from North Western
—assistant professor at North Western University Medical School

DR. CLARENCE ROSENCRANS.

—clinical psychologist at University of Alabama
—PhD. in psychology

Grove Press, Inc., Howard Wagonheim, 5 West Amusement Co., Inc. v. Maryland State Board of Censors, 252 A2d 240, (Md. Court of Appeals)

JAMES B. MACKIE

—associate professor of Medical Psychology University of Maryland Medical School
—B.A. in Fine Arts
—M.A. in Anthropology
—taught courses in sexual behavior
—taught courses in projective techniques

PETER H. ROSSI

—sociologist, chairman of Department of Social Relations at John Hopkins
—former professor of Sociology and director of National Opinion Research Center at University of Chicago
—PhD.
—former editor of American Journal of Sociologists
—associate editor of American Sociology
—consultant in sociology for the Kerner Commission
—author of books and articles in field of sociology

RONALD PAULSON

—professor of English at John Hopkins
—chairman of English Department
—PhD. from Yale
—Guggenheim fellow
—average of two films per week
—author of essays and books on English and Graphics

DR. IRVING BROWN

—professor and director of Fine Arts program at University of Maryland
—PhD. in theatre arts and fine arts
—specialists for U.S. Department of Education in Theatre, Dance and Speech
—lectured many times

DR. ANKE A. EHRHARDT

—instructor in Medical Psychology
—working on Psychohormonal Research Unit in Department of Psychiatry and Behavior Sciences at John Hopkins
—PhD. in psychology
—taught courses in projective techniques
—lectured on sexual behavior and development
—co-authored work on psychology of sex

JAROMIR STEPHANY

—chairman of Department of Photography and Films at Maryland Institute
—organizer of Maryland Film Festival
—curatorial assistant at George Eastman House-one of three film archives in U.S.
—B.A. in Photography
—M.A. in Fine Arts

State of New Hampshire v. *Donald Critchley*, (Derry District Court)

KEVIN KELLY

—drama critic of Boston Globe for eleven years
—lectured at colleges
—M.A. in Fine Arts from Boston University

Grove Press, Inc., et al v. *Anthony B. Flask, et al*, No. C69-735, (U.S. District Court, Northern District Ohio)

DR. CHARLES DELEON

—psychiatrist

WILLIAM IRWIN

—former chairman political science Western Reserve University
—professor of political science

EDWARD HENNING

—curator of Modern Art and Films at Cleveland Art Museum

ARTHUR KNIGHT

—articles on sex and cinema
—professor of Cinematography at Southern California

Kansas v. *A Motion Picture Entitled "I Am Curious-Yellow"*, No. 6122, (District Court of Johnson County Kansas)

WILLIAM A. O'CONNOR

—practicing clinical psychologist
—chief psychologist and director of Research at Kansas State Mental Hospital
—lecturer at University of Kansas Medical Center

CAROL LUHN

—practicing psychologist
—consultant at Kansas State Medical Hospital
—staff psychologist at Western Missouri Mental Health Center

DR. BYRON FREDERICK EICHER

—consultant in group psychotherapy at Kansas State Mental Hospital
—clinical psychologist
—director of psychodrama at Mareno Academy in New York

PROFESSOR OSCAR R. EGGERS

—associate professor of sociology
—director of Family Study Center at University of Missouri at Kansas City

DR. JAMES K. LOUTZENHISER

—psychiatrist
—assistant professor of psychiatry at Kansas University Medical Center
—instructs in Family and Films course at University of Missouri at Kansas City
—published reviews of films and books on film
—engaged in private practice of psychiatry

DR. STANTON L. ROSENBERG

—engaged in private practice of psychiatry

State of North Carolina v. Halsey Melone, Cr No. 28,000 (General Court of Justice, Guilford County)

DR. HERMAN MIDDLETON (N.C.)

chairman of Department of Drama and Speech, University of North Carolina at Greensboro

MRS. DOROTHEA WRIGHT (N.C.)

candidate for PhD. in English

Commonwealth of Massachusetts v. Karaleris, et al. Nos. 43068 69 70 71. (Suffolk County Superior Court)

KENNETH S. KISTER

assistant Library Science professor at Simmons College

EDGAR DRISCOLL

—film critic for Boston Globe

RICHARD CARTWRIGHT

—chairman of Department of Humanities at M.I.T.

JANE HANNIGAN

—professor at Simmons College

PROFESSOR JAMES HENDRICKSON

—professor of Chemistry at Brandeis University

NICHOLAS NYARY

—director of World Affairs Council in Boston

PROFESSOR ROBERT STEELE

—professor of Cinematography at Boston University

PROFESSOR DAVID WHITE

chairman of Department of Journalism at Boston University

PROFESSOR SAMUEL WALLACE

professor of Sociology at Brandeis University

PROFESSOR MARK LEVINSKY

professor of Philosophy at M.I.T.

PROFESSOR SYLVAN BROUMBERGER

professor of Philosophy at M.I.T.

APPENDIX E

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
522 FIFTH AVENUE
NEW YORK, N.Y. 10036

April 1, 1970

Edward de Grazia, Esq.
1320 19th Street, N.W.
Washington, D.C.

Dear Mr. Grazia:

You have requested information with respect to the number of motion picture censor boards now operative in the United States.

The State of Maryland is the only state which maintains a censor board which examines all motion pictures prior to their release for the purpose of censorship and licensing.

The State of Rhode Island maintains a motion picture review board empowered to classify motion pictures. The Rhode Island Board does not review all motion pictures. Exhibitors are required to submit suggested classifications, "suitable" or "not suitable", for motion pictures to be exhibited in Rhode Island. If the Board questions a suggested classification, it may request a screening of the picture for purposes of classification only. To my knowledge, during the year and a half in which the Rhode Island Board has been operative, it has screened less than 25 motion pictures.

There are two cities which have operative motion picture review boards. The City of Dallas has a classification board which operates in the same fashion as the Rhode Island Board, i.e., not all pictures are reviewed, only those requested for screening after self-classification by the exhibitor.

The City of Chicago reviews those motion pictures which are to be shown to persons under 13 and licenses

them for such exhibition. Motion pictures which will be limited in their exhibition to adults are not licensed.

Several communities such as Milwaukee, Wisconsin and Detroit, Michigan have quasi official boards. The Milwaukee Motion Picture Commission has no legal authority to censor motion pictures, but does review motion pictures for purposes of censorship. No license is issued by the Commission and its only authority is to request exhibitors to abide by its decisions. In Detroit, Michigan, the Chief of Police reviews motion pictures. However, again, the authority to do so is subject to challenge.

To my knowledge, these are the only operative motion picture censor boards or groups at the present time. There may be instances of unofficial censorship by various government authorities in isolated municipalities, but the above boards represent the only official boards of which we have knowledge.

Sincerely yours,

Barbara Scott

BS:wc

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 905

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

APPELLANTS' REPLY MEMORANDUM

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1. Appellee is plainly in error in asserting that the only basis for this Court to exercise its appellate jurisdiction in this case under 28 U.S.C. § 1257(2) is the challenge made to the constitutionality of the Maryland

censorship statute on its face (Motion to Dismiss or Affirm, pp. 3-4, 8). Ever since *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), it has been clear that a claim that a State statute, albeit constitutional on its face, has been unconstitutionally applied in a particular case is entitled to appellate review in this Court. That principle has been applied in cases regarding books and motion pictures which had been found obscene under local laws, even though the applicable statutes were not broadly challenged. *E.g., Mishkin v. New York* 383 U.S. 502 (1966); *Memoirs v. Attorney General*, 383 U.S. 413 (1966). Moreover, under 28 U.S.C. § 2103, the Jurisdictional Statement filed herein must "be regarded and acted on as a petition for writ of certiorari" even if appellate jurisdiction is wanting.

2. Appellees are also plainly in error in asserting that *Redrup v. New York*, 386 U.S. 767 (1967), "is not authority for summary reversal even if the Court were to view the film, review the testimony, and come to the conclusion that it was not obscene in the constitutional sense" (Motion, pp. 9-10).

a. This Court followed precisely that course in the 18 cases cited on pages 11-12 of the Jurisdictional Statement, and has done so again most recently in *Carlos v. New York*, No. 524, this Term, decided December 8, 1969. That is the most efficient method of disposing of cases in which constitutionally protected material has erroneously been suppressed by State or local authorities.

b. There is no merit whatever to the assertion that this record supports a finding of "pandering" under *Ginzburg v. United States*, 383 U.S. 463 (1966). Only one judge in seven below paid any attention whatever

to that claim, and its only alleged support in this record is the published scenario of the film, and the description of it in the concurring opinion as including "an obvious emphasis on the sexual aspects of the motion picture" (J.S. 15a-16a). We attach the scenario—which was introduced in evidence below—as a supplement to this memorandum. It is apparent from an examination of this scenario that the purpose of its distribution was far removed from "the leer of the sensualist" found in *Ginzburg* (383 U.S. at 468), and was no part of any "sordid business of pandering" (383 U.S. at 467). The same claim made recently against the same scenario of the film in the State courts of New Jersey was fully and unequivocally rejected. The trial judge in *Lordi* v. *UA New Jersey Theatres, Inc. and Grove Press, Inc.*, Superior Court of New Jersey Chancery Division, Essex County (Civil No. C-787-69), reprinted herein as Appendix A, decided December 9, 1969, stated: "The title 'I Am Curious (Yellow)' is not suggestive of any appeal to prurient interests. The cover on the paperback book is equally innocuous. Additionally, the book contains not only the scenario of the film, but also excerpts from the testimony of expert witnesses in the United States District Court proceeding to which I have earlier alluded. Both have some redeeming social value and advertise the movie at least in part on the basis of its political and social themes" (p. 14a, *infra*).

The "pandering" theory cannot, we submit, constitutionally be applied to support prior restraint of a motion picture. Moreover, the record in this case is devoid of any evidence relating to the promotion or distribution of the film or book. The distribution of neither the film nor the book was—or could be—in issue because of Maryland's blanket state-wide suppression of the film.

3. Appellee's suggestion that the decision below be affirmed summarily on the basis of a legal proposition never enunciated or approved by this Court *i.e.*, that motion pictures, unlike books, may constitutionally be suppressed even if they are not utterly without redeeming social value (Motion, pp. 12-22) is remarkable both because the constitutional principle is unsound and because it assuredly cannot, in any event, be subsumed in a summary affirmance. As recently as November 11, 1969, the Supreme Court of Pennsylvania in *Duggan v. Guild Theatre, Inc.*, 258 A.2d 858, characterized that contention as an argument "that if the medium can portray what is alleged to be obscene with greater impact, the medium itself is deserving of less constitutional protection." The court then rejected the claim, saying that "the First Amendment permits no such limitation on its protection of free expression" 258 A.2d at 861-862.

The argument set forth on pp. 15-20 of Appellee's Motion to Dismiss or Affirm is based upon a glaring error of fact. The author of the lengthy passage quoted at the cited pages did not represent Grove Press, Inc., which was not even a party to the *Memoirs* case, and the portion of a brief quoted at pp. 17-19 cannot be attributed to any appellant here. The "publisher and copyright holder of the book" in that case, as named in the Court's opinion, was G. P. Putnam's Sons, 383 U.S. at 415. It was not then and is not now the position of Grove Press, Inc., an appellant here, that films are entitled to any lesser or different measure of protection than books. Indeed, if films were determined to be a more forceful means than books for the communication of images and ideas concerning matters of social interest or importance, films would accordingly be entitled to more, not less, protection under our Constitution.

4. Appellee recognizes that the decision below conflicts with that of the United States Court of Appeals for the Second Circuit, but asserts that this conflict provides no basis for the exercise of this Court's certiorari jurisdiction or discretionary plenary review of cases here on appeal (Motion, p. 23). That contention is refuted by *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947), and *MacGregor* v. *Westinghouse Co.*, 329 U.S. 402 (1947). Indeed, even a conflict between two State courts of highest jurisdiction on a question of federal constitutional or statutory law warrants review here. See *United States* v. *Oregon*, 366 U.S. 643, 645 (1961). In light of the recent decision of the New Jersey Superior Court (see Appendix A) that *I Am Curious (Yellow)* may not constitutionally be suppressed as obscene, there now exists a conflict among State courts, as well as between State and federal courts.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, ESSEX COUNTY

Civil Action

Docket No. C-787-69

JOSEPH P. LORDI, Prosecutor of Essex County, *Plaintiff*,

v.

UA NEW JERSEY THEATRES, INC., a New Jersey corp. and GROVE PRESS, INC., a New York corp., *Defendants.*

Civil Action

Docket No. C-813-69

EDWARD J. DOLAN, Prosecutor of Middlesex County, *Plaintiff*,

v.

GROVE PRESS, INC., a New York corp. and NGC THEATRE CORPORATION, a Delaware corp., *Defendants.*

Civil Action

Docket No. C-829-69

LEO KAPLOWITZ, *Prosecutor of Union County, Plaintiff*,

v.

WOOD PLAZA THEATRE CORPORATION and GROVE PRESS, INC., a New York corp., *Defendants.*

Decided December 9, 1969

Mr. Robert L. Podrazy, Assistant Prosecutor, for plaintiff Essex County Prosecutor (*Mr. Joseph P. Lordi*, Prosecutor)

Mr. David J. Monyek, Assistant Prosecutor, for plaintiff Middlesex County Prosecutor (*Mr. Edward J. Dolan*, Prosecutor)

Mr. Stanley Kaczorowski and *Mr. Frederic Shauger*, Assistant Prosecutors, for plaintiff Union County Prosecutor (*Mr. Leo Kaplowitz*, Prosecutor)

Mr. Richard L. Amster for all defendants

Mr. Nathan Lewin of the New York and District of Columbia Bar, of counsel for all defendants

Mr. Douglas S. Liebhafsky of the New York Bar, of counsel for defendant UA New Jersey Theatres, Inc.

Mr. Donald S. Engel of the New York Bar, of counsel for defendant NGC Theatre Corporation

Mr. Bernard Kuttner of counsel for defendant Wood Plaza Theatre Corporation

MINTZ, J.S.C.

In these consolidated proceedings the Prosecutors of Essex, Union and Middlesex Counties allege that the motion picture film entitled "I am Curious (Yellow)" is obscene within the purview of *N.J.S.A.* 2A:115-1.1 *et seq.* They seek to enjoin the showing of this film in the theatres in their respective counties. *N.J.S.A.* 2A:115-3.5. The Prosecutor of Bergen County did not file a formal complaint but indicated that he would abide by the judgment of the court in these proceedings. The defendants deny that the motion picture is obscene within the meaning of *N.J.S.A.* 2A:115-1.1 and affirmatively assert that it is within the area of constitutionally protected freedom of speech and press under the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Sec. 6 of the Constitution of the State of New Jersey.

"I Am Curious (Yellow)" was produced in Sweden. The dialogue is in Swedish with English subtitles added. This film was adjudged not obscene in a two to one decision in *United States of America v. A Motion Picture Film Entitled "I Am Curious—Yellow"*, 404 F. 2d 196 (Ct. App. 2d Cir. 1968). The court reversed a judgment of forfeiture and

confiscation entered in the District Court upon a jury verdict of obscenity. Judge Hays writing for the majority recognized that there may be differences of opinion as to what the picture is "about", but said at p. 198:

> "* * * It would perhaps not be demonstrably wrong to say that it is concerned with that subject which has become such a commonplace in contemporary fiction and drama, the search for identity. It is the story of a young girl who is trying to work out her relationship to such political, social, and economic problems as the possibility of a classless society, the acceptance of the Franco regime, and the policy and practice of non-violence. At one point the girl experiments with oriental religious ritual and meditation. The girl's interpersonal relationships are also pictured, including particularly her relation to her father, presented as an idealist who has become disillusioned and has given up meaningful activity. A fairly large portion of the film is devoted to the relations between the girl and her young lover.
>
> A number of different techniques are employed in the production of the film. For example much of the early part is in terms of 'cinema verité,' showing the girl asking questions on subjects of public importance of the ordinary man or woman in the street. The problem of the nature of reality is suggested by passages representing the girl's fantasies and by the injection into the story of material concerning the making of the picture itself, such as the director's relations with the leading actress.
>
> There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some of them quite unusual. There are scenes of oral-genital activity."

The sex scenes leave very little to the imagination. One unusual scene is an episode of copulation in the crook of a very large old tree. Nearby a group of fundamentalist Christians are singing. There was testimony to the effect that this scene symbolizes the rebellion of youth against

authority and tradition. There is also a scene of intercourse on the balustrade of the Royal Palace in Stockholm in rhythm to the Swedish National Anthem while a palace guard endeavors to stand at attention watching the antics of the lovers. Apparently this was intended as a humorous incident and was explained by some witnesses as symbolic of the rebellion of youth against authority. Other sexual scenes are shown with greater candor.

The sexual content is frankly presented, and as Judge Hays observed in "*I Am Curious—Yellow*," *supra* at p. 198 "* * * with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts."

N.J.S.A. 2A:115-1:1 provides that:

> "(*a*) The word 'obscene' wherever it appears in the chapter to which this act is a supplement shall mean that which to the average person, applying contemporary community standards, when considered as a whole, has as its dominant theme or purpose an appeal to prurient interest.
>
> *(b) Any book, publication, picture, writing, record or other mechanical or electronic audio or visual reproduction or other material shall be obscene within the meaning of subsection (a) hereof if it is established that:*
>
> *(1) The dominant theme of the material taken as a whole appeals to a prurient interest;*
>
> *(2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and*
>
> *(3) The material is utterly without redeeming social value.*"

This statute is a codification of the law finally enunciated in Mr. Justice Brennan's opinion for the United States

Supreme Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts*, 383 U.S. 413 (1966), hereinafter referred to as *Memoirs*. As observed in that opinion all three criteria set forth in the cited statute must coalesce to justify a finding of obscenity. Each of the three criteria is to be applied independently. The social value of the film can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness. If the material in question possesses only a modicum of social value, it is not "utterly without redeeming social value." *Memoirs, supra* at 419.

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the protection of the First Amendment unless excludable because they encroach upon the limited area of more important interests. The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. However, obscenity is not within the area of constitutionally protected speech or press. *Roth* v. *United States*, 354 U.S. 476, 484 (1957). But *cf. Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Obscenity is excluded from the constitutional protection only because it is utterly without redeeming social value. The portrayal of sex in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. *Roth* v. *United States*, *supra* at 487. Material dealing with sex in a manner that advocates ideas, *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684 (1959), or that has literary, scientific or artistic value or any other form of social importance may not be termed obscene and denied constitutional protection. *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).

While the State has an interest in and may prevent the dissemination of material deemed harmful to children, that

interest does not justify a total suppression of such material for to do so would reduce the adult population to seeing and reading only what is fit for children. *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957); *Jacobellis* v. *Ohio*, *supra*.

Judge Hays stated in *"I Am Curious Yellow," supra*, that the nudity and sexual activity depicted is part of an artistic whole and is united with and related to the story and the characters which are presented. He held at pp. 199-200 that although sexual conduct may be one of its principal themes:

> "* * * it cannot be said that 'the dominant theme of the material taken as a whole appeals to a prurient interest in sex.' Whatever the dominant theme may be said to be * * * it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as 'prurient.'
>
> It is even more clear that 'I Am Curious' is not utterly without redeeming social value. * * * it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual effort that the first amendment was designed to protect."

Judge Friendly in a separate concurring opinion stated that Judge Hays' opinion demonstrates the required modicum of social value in the film. He relied solely upon this fact in finding it not obscene and concluded at p. 201:

> "* * * I would agree that the presence of 'redeeming social value' should not save the day if the sexual episodes were silmply lugged in and bore no relationship whatever to the theme; a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms. While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting."

Chief Judge Lumbard filed a dissenting opinion in which he stated at p. 203:

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anythong about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.
>
> While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest. Nor is it persuasive that the explicit sex scenes take only about 10 minutes out of 120. The enormous visual impact of a motion picture, as distinguished from other media cannot be disregarded. *Cf. Freedman* v. *Maryland*, 380 U.S. 51, 61, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). The combination of sight and sound, in the darkness of the movie theatre, result in a uniquely forceful impact on the audience. Because of the nature of this medium, sexual scenes in a motion picture may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine. *Cf. Landau* v. *Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967). * * *"

In *Howard Wagonheim, Agent, etc.* v. *Maryland State Board of Censors* (Ct. App. Md.) filed October 22, 1969, the Court by a 4 to 3 vote adjudged the film in question to be obscene. Three members of that Court in effect adopted the dissent of Chief Judge Lumbard in *"I Am Curious—Yellow," supra.* A fourth member concurred but empha-

sized that there was substantial evidence to indicate pandering within the ambit of *Ginzburg v. United States*, 383 U.S. 463 (1966). The three judges who dissented agreed with Judge Friendly and found that the film possessed a "modicum of social value." Counsel represented that the Maryland decision is on appeal to the United States Supreme Court.

The film in question has also been the subject of litigation in several other jurisdictions, with conflicting results. This court viewed the film and is called upon to make an independent judgment, giving such consideration as it deems appropriate to the expert testimony presented before it. Whether or not the motion picture should be suppressed requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963).

My conclusion is that the dominant theme of this motion picture taken as a whole appeals to a prurient interest. I also find that the film is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

The crucial issue is whether the motion picture is utterly without redeeming social value. There was considerable testimony presented on this criterion by plaintiffs and defendants. I will first briefly record my observations respecting the witnesses for the plaintiffs on this issue. Father Morton Hill, a Jesuit Priest, is a member of the Presidential Commission on Obscenity and President of an organization known as Morality In Media. He stated that the film was utterly without redeeming social value. On cross-examination he testified that the important social issues in the picture are treated insignificantly. The only impact that the picture gives is the sex impact. The rest of the picture is boring. Apparently he weighed its minimal social value against its prurient appeal and patent

offensiveness, contrary to the rule prescribed in *Memoirs, supra.*

Dr. Ralph Brancale, a psychiatrist, and Director of the State Diagnostic Center, and Dr. Basil Campean, a psychiatrist affiliated with the Center, each regarded the sex episodes as entirely unrelated to the remainder of the film. They stated that the 10 or 12 minutes of sexual encounter was included as box office appeal without which the film would not attract the public. They found no redeeming social value in the film.

Mr. James Patrick McFadden, assistant publisher of National Review, a magazine, and publisher of a newsletter entitled Combat, was of the view that the girl's social and political activities were only "vaguely related" to her personal life and that there was nothing in the movie to justify the explicit and offensive sex scenes.

Mr. Charles Francis Farley Clinton, an editorial writer for Triumph Magazine, was of the view that the film concerns itself with the character and habits of an unhappy promiscuous Swedish girl who may be engaged in defending Communism. He said there is also an inquiry into the mores and politics of Swedish society. However, in his opinion the patently offensive sexual theme overrides everything else in the film. He was not subjected to cross-examination, presumably because he "weighed" the social value of the film against its prurient appeal and patent offensiveness contrary to the rule prescribed in *Memoirs, supra.*

The defense presented an array of witnesses. I do not accept their testimony with respect to the first two criteria, but do find their testimony helpful with respect to the third criterion.

Mr. Ned Polsky, an assistant professor of sociology at the State University of New York, opined that the film has a great deal of social value because it deals with the discord

between the generations and the search of the younger generation for new solutions. He felt that the sex scenes are not tacked on but are an integral part of the story in showing how sex is related to one's life.

Dr. David Ernest Scanlon, assistant professor of drama and speech at Rutgers, and a student of Swedish drama, testified that he regards the film as an example of the "quest" theme in which all parts of the picture fit together. He characterized it as an "earnest work of art having integrity and coherence," the product of reflection and the artist's best impulses and technique.

Mr. Hollis Alpert is a film critic for Saturday Review, a film columnist for McCall's Magazine, a publisher of four novels, and a lecturer at several universities on the subject of films. He said that "I Am Curious" had social value because it deals with the problems of a young girl in quest for personal values, and that the sex scenes are definitely related to the general theme.

Mr. John Ivan Simon was an articulate witness for the defense. He has taught English, the humanities and comparative literature at several universities. He is the film critic for New Leader. He has written film and theatre reviews for the New York Times, Harper's, Time Magazine and other publications. He was the drama critic for Commonweal in 1967-1968, which he characterized as a liberal Catholic weekly. He viewed the film as portraying the search for the good life and thought the film's message on sex was the need for a permanent lasting relationship. The movie gave him insight into the contemporary Swedish system. He regarded the film as a minor, though honest, work of art.

Dr. Tom Levin is an assistant professor of psychiatry at Albert Einstein College of Medicine. He said that "I Am Curious" has a significant social message in that it reveals the quest of young people for an understanding of their

relationship within a particular society. The film, in his view, says that sex is an integrated part of the reality of life.

Dr. Charles Winick is a professor of sociology at City College of New York, and a licensed psychologist in New York. He servd as advisor on the effects of mass media to the United States Senate Sub-Committee on Juvenile Delinquency. He is a member of the Executive Planning Committee of 1970 of the White House Conference on Children and Youth. Dr. Winick viewed the film at the Customs House in New York at the request of the United States District Attorney in the expectation that he might be called as a witness in the Federal District Court proceeding to which I have already alluded. However, he testified for the distributor Grove Press, Inc. He regarded the film as extremely important because aesthetically it succeeds in relating the various quests of Lena, the central figure in the picture. He stated that the explicit sex scenes are part of an artistic whole. He said that the film has significance in presenting themes important to today's young people and in presenting a frank characterization of Lena.

Mr. Gerald J. Gargiulo is an assistant professor of religious studies at Manhattan College, and also a practicing psychoanalyst in New York. He believes the picture has social value because its real concern is to present political ideals and secondarily, to show what young people are experiencing in sexuality. He also said that the sub themes of non-violence and fraternization are profoundly religious themes. Although he did not regard the film as a great work of art, he concluded that it had social value.

Professor Sol Worth is associated with the Annenberg School of Communication, a graduate school of the University of Pennsylvania. He has lectured on films at several universities and has produced films. He said that the film has artistic value and is an artistic unit. It is a complex picture that presents issues which make you think.

The themes he said are not easy to follow, but are not disjointed, and the sexual episodes follow naturally.

Dr. Henry A. Davidson, a psychiatrist and former Superintendant of Overbrook Hospital, a psychiatric hospital, testified that the film has social value in that it shows what is troubling our young adults.

The defense offered into evidence a series of reviews by film critics which were received for the limited purpose of showing that the film was seriously treated in respected publications as follows: Vincent Canby in the New York Times, John Simon in the New York Times, Richard Schickel in Life, Leonard Gross in Look, William Wolf in Cue, Hollis Alpert in Saturday Review, Richard Atcheson in Holiday, Liz Smith in Cosmopolitan, Stanley Kauffmann in The New Republic, Leroy F. Aarons in The Washington Post, Ted Mahar in The Portland Oregonian, Bernard L. Drew in The Hartford Times, and Stephen Allen in The Camden Courier-Post.

Plaintiffs offered into evidence the reviews of Alan Adelson in the Wall Street Journal, Rex Reed in the New York Times, Nancy Razen in the Newark Star Ledger, Charles Champlin in the Los Angeles Times, and James Kilpatrick in the Los Angeles Times.

While I do not unqualifiedly accept everything the experts for the defense had to say on whether or not the film is utterly without redeeming social value, I believe that their collective testimony was clearly more persuasive than that of the plaintiffs and amply reflects the required "modicum of social value." *Memoirs, supra.* And I concur in Judge Friendly's finding to which I made earlier reference and state, as he did, that I cannot conscientiously find that a connection between the serious purpose of the film and the sexual episodes and displays of nudity is wholly lacking.

However, plaintiffs urge that the alleged pandering of the movie should be decisive in finding that it is utterly without

redeeming social value. They argue that the film has been advertised in a manner calculated to capitalize on its extensive portrayals of nudity and sexual activity rather than its supposed serious message, and thus falls within the condemnation of *Ginzburg* v. *United States, supra.* The court there said at p. 470 " * * * Where the purveyor's *sole* emphasis is on the sexually provocative aspects of his publications, that fact *may* be decisive in the determination of obscenity. * * * (Emphasis added) The pandering doctrine established in *Ginzburg, supra,* has been substantially incorporated in our statutory law. *N.J.S.A.* 2A:115-1.2 provides that:

> "In any prosecution under the provisions of the chapter to which this act is a supplement, evidence of pandering or evidence that the sale or distribution of the material in question was exploited on the basis of its appeal to prurient interests, may be considered in determining whether the material is utterly without redeeming social value."

Plaintiffs' charge of pandering is based solely upon the sale and distribution of the scenario of the film which is contained in a paperback book sold to the general public. The scenario was designed to generate an interest in the motion picture. It is argued that this scenario contains a disproportionately high percentage of pictures of sexual activities and nudity in comparison to the number of such scenes in the film. Hence, it is asserted that pandering operates to negate whatever redeeming social value the film might otherwise have and renders it obscene. In *Ginzburg, supra,* the court did not deal with a civil action for the suppression of a book or movie, as we are here concerned with, but rather with a criminal action based on the alleged distribution of obscene literature through the mails. While Mr. Justice Brennan's opinion for the court indicated that pandering properly could be a decisive factor in a determination of obscenity, he also emphasized that criminal convictions of the defendants did not necessarily imply sup-

pression of the materials involved, nor chill their proper distribution for a proper use. 383 U.S. at 470, 471, 475.

In the present civil actions plaintiffs seek to enjoin the showing of the film in question. *Ginzburg* and the instant cases are factually distinguishable. In *Ginzburg* there was abundant evidence to sustain the finding that the *sole* emphasis in the advertising was on the sexually provocative aspects of the publications. In the case at bar the newspaper advertising has been completely devoid of any such appeal. There is no claim that the advertising of the film at the theatres here involved is objectionable. The title "I Am Curious (Yellow)" is not suggestive of any appeal to prurient interests. The cover on the paperback book is equally innocuous. Additionally, the book contains not only the scenario of the film, but also excerpts from the testimony of expert witnesses in the United States District Court proceeding to which I have earlier alluded. Both have some redeeming social value and advertise the movie at least in part on the basis of its political and social themes. The book which now sells for $1.75 was at the time of this trial available in Newark bookstores, approximately 12 miles from the Colony Theatre in Livingston where the film is currently being shown. There was no testimony respecting the availability of the book in Middlesex or Union Counties. Under all the stated circumstances, I cannot find that the advertising of the film unduly emphasizes its sexually provocative aspects.

It is plaintiffs' burden to prove that the film is utterly without redeeming social value. They have failed to do so. On the basis of all the evidence I reluctantly and with regret conclude that "I Am Curious (Yellow)" does possess a modicum of redeeming social value.

Defendants additionally urged the unconstitutionality of the obscenity statute, *N.J.S.A.* 2A:115-1.1 *et seq.*, as applied to them particularly in light of *Stanley* v. *Georgia*, *supra*. I refrain from passing upon the same in view of my deter-

mination that the plaintiffs are not entitled to injunctive relief. It is settled law that a constitutional issue will not be resolved unless absolutely imperative in the disposition of the litigation. *Smith* v. *Livingston*, 106 N. J. Super. 444 (Ch. Div. 1969), aff'd o.b. 54 N.J. 525 (1969).

I thoroughly disliked this movie. I found it offensive and for the most part a bore. However, my subjective distaste for "I Am Curious" is not a proper basis for a finding of obscenity. I am required to act within the guidelines established by the applicable decisions of the United States Supreme Court which have been incorporated into our obscenity statute. *N.J.S.A.* 2A:115-1.1. In doing so this court is not acting as a censor but is instead discharging its assigned role in delineating the scope of constitutionally protected speech and press. *G. P. Putnam's Sons* v. *Calissi*, 86 N. J. Super. 82, 94 (Ch. Div. 1964), rev'd on other grounds 50 N. J. 397 (1967).

Finally, it was represented by counsel that the basic contract between the distributor Grove Press, Inc. and the theatre exhibits provide for the exclusion of minors under the age of 18 from the audience. More importantly, such exclusion is dictated by *N.J.S.A.* 2A:115-1.3. There was no proof indicating that the current exhibitors were in violation of this provision. However, the exhibitors are cautioned to strictly adhere to this requirement.

A form of judgment should be submitted in accordance with R.R. 4:42-1.

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IN THE

Supreme Court of the United States

October Term, 1970.
No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

vs.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

On Appeal From the Court of Appeals of Maryland.

MOTION FOR LEAVE TO FILE BRIEF WITH BRIEF ANNEXED AS AMICUS CURIAE FOR ADULT FILM ASSOCIATION OF AMERICA, INC.

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Appellee.

On Appeal From the Court of Appeals of Maryland.

MOTION OF ADULT FILM ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The Adult Film Association of America asks leave to file the annexed Brief as *amicus curiae* in this case. Appellants have consented to the filing of this amicus curiae brief, but appellee has refused its consent.

The Adult Film Association of America is a membership corporation consisting of producers, distributors and exhibitors of motion picture film, directed primarily at adult audiences.

Amicus curiae has a substantial interest in the determination of the issues presented by this case. *Amicus* is unalterably opposed to censorship, believing it to be the sworn enemy of freedom and liberty. The Asso-

ciation is deeply committed to the principles of freedoms of speech and press upon which our country was built and prospered.

Because the films produced, distributed and exhibited by Association members find their way into every corner of our country, *amicus* is concerned with the standard pursuant to which its films may be judged. *Amicus* believes that the standard should be the one foreshadowed in *Redrup* and *Stanley*, namely that theatre exhibitors should be free to exhibit even "obscene" films to consenting adults, provided the privacy of the general public is not invaded.

Amicus also believes that this Court should reaffirm its "ceaseless vigilance" to prevent the erosion of First Amendment rights by the States in the name of regulating or suppressing obscenity.

It is, therefore, respectfully requested the Adult Film Association of America be granted leave to file a brief *Amicus Curiae*.

STANLEY FLEISHMAN,
Attorney for Amicus Curiae, for Adult Film Association of America, Inc.

SAM ROSENWEIN,
Of Counsel.

BRIEF AMICUS CURIAE FOR ADULT FILM ASSOCIATION OF AMERICA, INC.

Interest of the Amicus.

The interest of the *amicus* is set forth in the Motion for Leave to file this Brief.

ARGUMENT.

I.

Obscenity Is Protected by the Free Speech and Press Provisions of the First and Fourteenth Amendments, and May Only Be Regulated or Suppressed in the Interest of Legitimate State Interests, Such as Protecting Minors and Protecting the Privacy of the General Public.

The August 6, 1970 issue of the Los Angeles Times (Part 1, p. 5), announced that the Presidential Commission on Obscenity and Pornography had concluded that:

> "Research indicates that erotic materials do not contribute to the development of character deficits, nor operate as a significant factor in antisocial behavior or in crime and delinquency causation."[1]

[1]The Commission was established by Congress in Public Law 90-100. A Progress Report to the Congress and to the President was issued in July 1969. This Progress Report is referred to in the Brief *Amici Curiae* of National General Corp., et al. in *Byrne v. Karalexis,* October Term, 1969, No. 1149, Addendum, p. 3. The Chairman of the Commission is William B. Lockhart, Dean of the Minnesota Law School. Another member of the Commission is Charles H. Keating, Jr., founder of the Citizens for Decent Literature. The activities of that group were discussed by the petitioners in *Redrup v. New York* and *Austin v. Kentucky,* 386 U.S. 767, in reply to the *amicus curiae* brief filed by the Citizens for Decent Literature. According to the Los Angeles Times story, "the draft report has been leaked to a House sub-committee trying to line up expert witnesses to challenge [the Commission's] findings at hearings next week."

There is no evidence, the Report concluded, "that exposure to pornography operates as a cause of misconduct in either youths or adults".

A subsequent Associated Press story states that "the Commission will suggest the repeal of all federal, state and local laws against showing and selling pornographic films and other materials to adults". According to the Associated Press, the Report states "it is exceedingly unwise to attempt to legislate individual moral values and standards". Los Angeles Times, August 9, 1970 (Sec. A., p. A). The same edition of the Los Angeles Times (Sec. G., p. 3) carries a story titled "Denmark and Pornography", which quotes the following statement by Karen Horens, the tenth woman minister to be ordained in the Danish Lutheran Church:

> "I'm convinced access to pornography is an excellent thing for the lonely and aged. And I'm sure that it's just now with the new freedom that we're going through a crude period. With time the quality will improve. . . . Mothers, friends of mine, tell me about their teen-age sons bringing home porno magazines and leaving them lying around the house. They're not ashamed about them, and this I think is a good thing. Many teenagers, including those in my confirmation class, aren't ashamed about knowing about pornography, but they do have a certain distaste for it. Maybe we're going to be in for a back-lash from this next generation. That would be truly a pity.
>
> "Basically, though, as far as pornography is concerned I feel, well, now that's out of the way, let's get on to the real problems: old age, the woman in the home."

The forthcoming Presidential Report, which follows two years of study, appears to be an appropriate occasion to re-examine the doctrine that obscenity is not speech and therefore is not protected by the First and Fourteenth Amendments to the United States Constitution.[2]

A. Twenty-one years ago, in *Commonwealth of Pennsylvania v. Gordon, et al.*, 66 D&C 101 (1949), Judge Curtis Bok argued that "obscenity" was sex speech entitled to protection under the First and Fourteenth Amendments in the same fashion as other controversial speech. Accordingly, he stated that a work dealing with sex could not constitutionally be condemned unless it presented a clear and present danger of serious social harm. He also expressed doubt that any antisocial action follows exposure to obscene material, a view apparently shared by the Presidential Commission.

Seven years later, in *United States v. Roth,* 237 F. 2d 796 (2 Cir. 1956), Judge Frank, in a concurring opinion, paid his respects to Judge Bok, stating that before reading Judge Bok's opinion he "had little doubt about the validity of a purely punitive obscenity statute. . . . [Judge Bok's] brilliant opinion, which states

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[2]Judge Irving Kaufman, after observing that the Court held in *Roth* that obscenity is not speech, stated: "If obscenity is not speech then what is it? I would not be giving away a big secret to state that efforts to make *that* determination have not been remarkably successful up until now. I am certainly not attempting to have any fun at the Supreme Court's expense. I cannot myself offer anything of value toward formulating that inconceivably difficult definition. . . . Given the complexity of both communication and people, such a definition—of obscenity—may be beyond the power of discursive language." 11 Annual James Madison Lecture, New York Law Journal, April 1, 1970 (emphasis in original).

arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix." (237 F. 2d at 805-806).

Judge Frank urged a re-examination of the obscenity question in light of the expanding freedom afforded speech by this Court in other areas.

> ". . . I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity with which, up to now, I think the Supreme Court has not dealt in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them." (237 F. 2d at 804).

B. In *Roth-Alberts*, this Court rejected Judge Frank's approach and charted a different course. Essentially, the Court held "that obscenity is not protected by the freedoms of speech and press", guaranteed by the First and Fourteenth Amendments (354 U.S. at 81). In rejecting the First Amendment argument, the Court said:

> "It is strenuously urged that these obscenity statutes offend the constitutional guarantees because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt anti-social conduct which is or may be incited in the persons stimulated to such *thoughts*. . . It is

insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in Beauharnais v. People of State of Illinois, supra, 343 U.S. at page 266, 72 S.Ct. at 735:

> 'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'" (354 U.S. at 487) (emphasis in original).

Beauharnais was significantly undermined in *New York Times Co. v. Sullivan*, 376 U.S. 254, and its progeny. Mr. Justice Brennan there held that the Court would not grant or deny First Amendment protection because of "mere labels".

> ". . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (376 U. S. at 269).

Commenting on this case, Professor Harry Kalven, Jr. said:

> ". . . No matter how speech is classified, there must still be First Amendment consideration and review. No category of speech is any longer beneath the protection of the First Amendment. Had the *Times* case preceded *Roth,* for example, *Roth* could not have been written the way it was, although the decision might have been the same. Obscenity, too, it would seem, 'can claim no talismanic immunity from constitutional limitations.'
>
> "The special logic of *Chaplinsky, Beauharnais,* and *Roth* may well disappear now that the *Times* opinion is on the books. . . ." (Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment", The Supreme Court Review, 191, 217-218 [1964]).

In addition to relying on the authority of *Beauharnais v. Illinois,* 343 U.S. 250, *Roth* was keyed to the "social value" test. ". . . [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." (254 U.S. at 484).

Mr. Justice Brennan, writing in the Harvard Law Review,[3] amplified this view, stating:

> "As I said, the absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such. One view is that the first amendment ren-

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[3]Brennan, Wm. J., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv. L. Rev. 1, 5-6 (1965).

> ders immune from regulation only speech that has 'redeeming social importance.' The stated ground of this view is that, although all ideas having even the slightest redeeming social value—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, implicit in the history of the first amendment is the rejection of speech that is utterly without redeeming social importance. Thus, certain forms of speech—notably obscenity—deemed not to have redeeming social value, are not protected against laws that punish or suppress them. . . ."

In *Stanley v. Georgia,* 394 U.S. 557, 564, Mr. Justice Marshall, citing *Winters v. New York,* 333 U.S. 507, 510, emphasized the First Amendment right to receive information and ideas, *regardless of their social worth.* In *Winters,* the Court said:

> ". . . We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. . ."

Subsequently, again citing *Winters v. New York,* Mr. Justice Marshall said: "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological

content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (394 U.S. at 566).

C. It thus appears that both of the propositions upon which *Roth* rested have been undermined by subsequent decisions of the Court. Neither *Beauharnais v. Illinois* nor the "social value" test presently support the proposition that obscenity is not speech and is, therefore, unprotected by the First and Fourteenth Amendments.

The emerging doctrine that obscenity is protected, absent exposure to minors or to an unwilling audience, was initially suggested in *Redrup v. New York,* 386 U.S. 767, 770:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. . . . In none was there any suggestion of an assault upon individual privacy or publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. . . . And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

Redrup was made more explicit in *Stanley v. Georgia.* In *Stanley,* the Court rejected the unqualified statement in *Roth* "that obscenity is not protected by the First

Amendment" (394 U.S. at 560). Properly understood, "*Roth* and its progeny . . . mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity" (394 U.S. at 563). A valid governmental interest exists where children are concerned, or where there is an invasion of the privacy of the general public (394 U.S. at 567). Thus limited, *Roth* remains unimpaired (394 U.S. at 568).

From *Roth* to *Stanley* is twelve years. Over that period, the Court, with Herculean effort, has attempted to provide guide-lines pursuant to which this Court, and lower courts, might curtail "obscenity" without impairing freedom of speech and press. The effort has not proved successful. Experience demonstrates, it is respectfully submitted, not only that the task may be beyond the power of the legal process, but also that inevitably the legal regulation of obscenity "curtailed discussion of important moral and artistic issues" and that this suppression "forecloses one of the main thoroughfares for the changing of moral and artistic view".[4]

Recognition by this Court that "obscenity" is protected by the free speech and press provisions of the First and Fourteenth Amendments has, of course, broad implications. As Mr. Justice Brennan observed,[5] a shift in the basic philosophy of law results in an epoch-making difference in the way court cases are decided. The findings of the Presidential Commission on Obscen-

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[4]Katz, Al "Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials, 79 Yale Law Journal 208, 209.

[5]Brennan, *op. cit.*, p. 10.

ity and Pornography and the holding in *Stanley v. Georgia* mark a shift in the law's philosophy, as it applies to obscenity. This shift, it is respectfully submitted, will not only benefit society at large, but will also benefit the judicial system. The shift will free this Court from the thankless and onerous task of acting as the "super-censor" of the Nation. It will also relieve our over-crowded court system[6] and make it possible for the courts to take on new litigation stemming from such pressing problems as pollution and consumer suits.

II.

This Court Must Continue Its "Ceaseless Vigilance" to Prevent the Erosion of Constitutional Rights by the States.

Even in the beginning it was recognized that exclusion of obscenity from First Amendment protection created serious dangers to constitutional guarantees. Accordingly, the Court stated in *Roth* (354 U.S. 476, 488):

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring

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[6]In *Jacobellis v. Ohio*, 378 U.S. 184, 199-200, Chief Justice Warren said: "[O]bscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the questions of what standards are permissible in enforcing proscriptions against obscene matter. . . . [M]ost of our decisions since *Roth* have been given without opinion and have thus failed to furnish [adequate] guidance. Nor does the Court in the instant case—which has now been twice argued before us—shed any greater light on the problem. . . ."

federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. . . ."

Over the years, the Court has had occasion—some would say too much occasion—to keep the door "tightly closed" to prevent intrusion upon constitutionally protected works dealing with sex.[7]

Today, the Court is again being asked to protect a challenged work, a film entitled "I Am Curious-Yellow". This film was found to have redeeming social value and not to appeal to prurient interest by the Court of Appeals for the Second Circuit. *United States*

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[7] *Hoyt v. Minnesota*, 90 S. Ct. 2241; *Walker v. Ohio*, 90 S. Ct. 1884; *Bloss v. Dykema*, 90 S. Ct. 1727; *Cain v. Kentucky*, 90 S. Ct. 1110; *Carlos v. New York*, 90 S. Ct. 395; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578; *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573; *Chance v. California*, 389 U.S. 89; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Connor v. City of Hammond*, 389 U.S. 48; *Schackman v. California*, 388 U.S. 454; *Cobert v. New York*, 388 U.S. 443; *Ratner v. California*, 388 U.S. 442; *Avansino v. New York*, 388 U.S. 446; *Rosenbloom v. Virginia*, 388 U.S. 450; *Sheperd v. New York*, 388 U.S. 444; *Mazes v. Ohio*, 388 U.S. 453; *Friedman v. New York*, 388 U.S. 441; *Keney v. New York*, 388 U.S. 440; *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448; *Quantity of Copies of Books v. Kansas*, 388 U.S. 452; *Books, Inc. v. United States*, 388 U.S. 449; *Aday v. United States*, 388 U.S. 447; *Gent v. Arkansas*, 386 U.S. 767; *Austin v. Kentucky*, 386 U.S. 767; *Redrup v. New York*, 386 U.S. 767; *Memoirs v. Massachusetts*, 383 U.S. 413; *Tralins v. Gerstein*, 378 U.S. 576; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Jacobellis v. Ohio*, 378 U.S. 184; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S. 684; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *One, Inc. v. Olesen*, 355 U.S. 371; *Times Film Corp. v. Chicago*, 365 U.S. 43.

v. A Motion Picture Entitled "I Am Curious-Yellow", 404 F. 2d 196 (2 Cir. 1968). This conclusion is plainly mandated by decisions of this Court.[8]

Amicus is deeply concerned lest the Court, disturbed by the charge that it is acting as "super-censor", abnegate its responsibility to protect constitutional rights by following the suggestion repeatedly made by Mr. Justice Harlan that a State has virtually unfettered discretion to determine the reach of the First Amendment within its own borders. *Amicus'* uneasiness flows from the fact that this view has tentatively won new adherence. *Hoyt v. Minnesota*, 90 S. Ct. 2241; *Walker v. Ohio*, 90 S. Ct. 1884; *Bloss v. Dykema*, 90 S. Ct. 1727; *Cain v. Kentucky*, 90 S. Ct. 1110; *Carlos v. New York*, 90 S. Ct. 395.

It is understandable why it would be appealing to leave the obscenity question in the hands of the States, thus removing the Court from this "constitutional disaster area". In 1959, Mr. Justice Harlan, concurring in *Kingsley International Picture Corporation v. Regents of N.Y.U.*, 360 U.S. 685, 707-708, said:

> "Giving descriptive expression to what in matters of this kind are in the last analysis bound to be but individual subjective impressions, objec-

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[8]See cases collected in note 7.

In *United States v. 10 reels MOTION PICTURE FILM entitled "Quiet Days in Clichy" etc.*, 90 S. Ct. 2227, this Court, after viewing the film "Quiet Days in Clichy", denied without prejudice petitioner's application to vacate a stay. Following this ruling the Honorable William P. Gray found the film to be not obscene. *United States v. 10 reels MOTION PICTURE FILM entitled "Quiet Days in Clichy" etc.*, United States District Court for the Central District of California, Civil No. 70-1116-WPG (July 10, 1970). A copy of Judge Gray's Findings of Fact and Conclusions of Law is attached hereto as APPENDIX A.

tively as one may try to discharge his duty as a judge, is not apt to be repaying. I shall therefore content myself with saying that, according full respect to, and with, I hope, sympathetic consideration for, the views and characterizations expressed by others, I . . . think that in banning this film New York has exceeded constitutional limits."

Nine years later, Justice Harlan observed that the subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication (Concurring opinion in *Ginsberg v. New York*, and dissenting opinion in *Interstate Circuit v. Dallas*, 390 U.S. 676, 704.):

"The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment. From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges. . . ."

Justice Harlan saw "no improvement in this chaotic state of affairs", unless "it is recognized that this whole problem is primarily one of state concern" (390 U.S. at 707).

In *Jacobellis*, Justice Brennan rejected the temptation to leave the final decision to the state courts (378 U.S. at 187-188):

". . . The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and

unpleasant task. But we cannot accept. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case. . . .'"

After observing that in other areas involving constitutional rights, the Court has recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case, Mr. Justice Brennan stated (378 U.S. at 189-190):

"'. . . We cannot understand why the Court's duty should be any different in the present case, where Jacobellis has been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as 'censor' or 'supercensor.' In judging alleged obscenity the Court is no more 'censoring' expression than it has in other cases 'censored' criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure

nor impugn the Court's performance of its obligation to test challanged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Professor Herbert Wechsler recently observed that a national standard—rather than a local one—was necessary to keep "the local bigot within decent bounds" (46 Virginia Quarterly Review 369, 382 [1970]). The limitless reach of the local bigot is made clear in the dissenting opinion of Chief Justice Warren in *Times Film Corp. v. Chicago*, 365 U.S. 43, 68-72. See also, Lockhart and McClure, "Literature, The Law of Obscenity, and the Constitution", 38 Minn. L. Rev. 298. After observing that censorship of obscenity has almost always been irrational and indiscriminate, Lockhart and McClure cite a number of examples, including the classic from Georgia, where the Chairman of the State Literature Commission stated: "I don't discriminate between nude women, whether or not they are art. It's all lustful to me." (*Id.*, at pp. 302-320).

Sometimes a local censor moves because of political opportunism; sometimes from religious fervor. The political motivation emerges clearly enough from the following news story appearing in the August 3, 1970 issue of Daily Variety:

"'I am Curious (Yellow)' cropped up as an issue in the primary election in Kansas to be held [August 4]. James Bouska, Johnson County prosecuting attorney who zeroed in on showing of the picture at the Kimo South Theatre in Overland Park last year, has billed himself as 'the first prosecuting attorney in the U.S. to block the showing of the controversial movie, 'I Am Curious (Yellow)'

"He is addressing the issue in his campaign platform 'as a public servant and parent.' He is a Republican seeking post of state Attorney General."

Religious overtones are found in a recent decision of the Honorable Harry Lathrop in the case of *Minnesota v. Getman*, Municipal Court, City of Duluth, Minnesota, No. 62013, unreported (July 27, 1970). Judge Lathrop, after observing that there has been much argument as to how to determine contemporary community standards, said:

". . . In any society, the development of which has been influenced and conditioned by any one of the great religions of the world, it is not difficult to determine such standards. . . . In the United States, where the Judeo-Christian ethics predominate, there is no mystery as to what contemporary community standards are. No one can deny that it was primarily the Judeo-Christian ethics which influenced and motivated the architects of our great Constitution in its drafting and adoption and which they applied to government

> and their daily lives. . . . Paul in his epistle to the Thessalonians gave us the rule and guide to follow in matters relating to sex.
>
> . . . It is from these Biblical sources that the people of this great country of ours have derived the standards of morality and conduct by which the vast majority of us live. It is by these standards that the vast majority of our citizens measure obscenity."

In *Gent v. Arkansas,* 239 Ark. 474, 393 S.W. 2d 519 (1965), Chief Justice Harris held that the City of Pine Bluff, Arkansas was the proper area to determine whether the magazines there involved were protected by the First Amendment. He said:

> "Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming features. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco, nor is there any way for us to know the 'standard' of the nation at large, but we think that evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas."

In reversing, this Court held that the magazines could not be condemned under any constitutional standard. *Gent v. Arkansas,* 386 U.S. 767.

It should be remembered that the governmental structure of the United States includes, in addition to the Federal Government and the fifty States, a total of 13,049 counties, 18,048 municipalities and 17,015 townships. United States Bureau of the Census: Statistical Abstract of the United States, 1969, p. 405.

If a film can be denied First Amendment protection because it does not meet the community standards of Oshkosh, or because it appeals to the prurient interest of the people in the City of Pine Bluff, or is deemed to be utterly without redeeming social value in Tuscaloosa, the First Amendment is dead for all practical purposes, at least where material is challenged as obscene. In *United States v. Klaw*, 350 F. 2d 155 (2 Cir. 1965), the Court recognized the serious threat to freedom of expression implicit in giving free rein to local communities to exclude from the First Amendment what they do not like (350 F. 2d at 170):

> ". . . While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches and other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we 'cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected' . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity."

Conclusion.

What emerges from the above is that something decisive must be done to solve the obscenity dilemma. One solution, and one fraught with danger, is for the Court to withdraw from the arena and let local censors run rampant. This, of course, would be an abnegation of this Court's sworn duty to protect constitutional rights. The other approach is for the Court to clearly hold that obscenity is speech, protected by the First and Fourteenth Amendments, and subject to regulation only to protect important legitimate societal interests. This course, it is submitted, is the one that will best secure freedom, as guaranteed by the First Amendment and respect the proper interests of the States.

Respectfully submitted,

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Attorney for Amicus Curiae, for Adult Film Association of America, Inc.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. 10 reels Motion Picture Film entitled "Quiet Days in Clichy" from Book by Henry Miller, Defendant. Grove Press, Inc., a New York corporation, Claimant. Civil No. 70-1116-WPG.

This matter coming on for trial before the Honorable William P. Gray, Judge Presiding, without a jury, a jury having been waived, plaintiff appearing by its attorneys, Robert L. Meyer, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, by Larry L. Dier, Assistant U. S. Attorney, and defendant and claimant appearing by their attorney, Stanley Fleishman.

The Court having heard the case and being duly advised now makes its findings of fact and conclusions of law.

FINDINGS OF FACTS

I

On May 2, 1970 two complete prints of the motion picture film "Quiet Days in Clichy" were imported into the commerce of the United States on behalf of claimant Grove Press, Inc.

II

The film is based upon a book by Henry Miller, by the same name, and it is a faithful translation of the book.

III

The book was published in the United States by Grove Press, Inc. in 1965. It has freely circulated

throughout the United States for approximately five years without the plaintiff ever charging that the book was obscene.

IV

The motion picture film "Quiet Days in Clichy" has been reviewed by Variety, a trade paper servicing the motion picture industry, and by Charles Champlin, the Entertainment Editor for the Los Angeles Times, and in each instance the opinion was expressed that it had artistic merit.

V

The claimant asserts that it intends to exhibit the motion picture film "Quiet Days in Clichy" to consenting adults only, under circumstances which do not invade the privacy or sensitivities of the general public. Claimant also asserts that it intends to advertise the film in good taste.

VI

Henry Miller, the author of the book "Quiet Days in Clichy", is one of America's well known living writers. His workers, while highly controversial and disturbing to many people, concededly have social value. His most popular book, "Tropic of Cancer", has been found to be not obscene by the United States Supreme Court (*Grove Press v. Gerstein*, 378 U.S. 577) and the California Supreme Court (*Zeitlin v. Arnebergh*, 59 C.2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963)). At the present time, a film entitled "Tropic of Cancer" is being exhibited in many parts of the country including Los Angeles. The film is based on the book "Tropic of Cancer" and contains the "tabu" words found in the book.

VII

There are many motion picture films being exhibited today in many parts of the nation dealing with sex and nudity and using all of the "tabu" words. Many of these films go beyond "Quiet Days in Clichy" in sexual explicitness and nudity, and others equal "Quiet Days in Clichy" in their use of language.

VIII.

The Court is unable to determine whether or not the film "Quiet Days in Clichy" goes substantially beyond customary limits of candor in the nation as a whole in the depiction or representation of matters pertaining to sex, nudity or excretion.

IX

Qualified, respectable experts have found that the film "Quiet Days in Clichy" has artistic merit and other social values. I am unable to find that it does not.

X

Bearing in mind the increasing frankness in society in matters pertaining to sex and nudity, and the possible artistic merit of the film "Quiet Days in Clichy", I find that the film appeals to the normal interest in sex and nudity which the average person has in such matters, and that it does not appeal to the prurient, *i.e.* shameful, morbid, interest of the average person.

CONCLUSIONS OF LAW

I

This Court has jurisdiction under 28 U.S.C. §1345 and 19 U.S.C. §1305.

II

The film "Quiet Days in Clichy" is not obscene; on the contrary, it is protected by the free speech and press provisions of the First Amendment to the United States Constitution. *Jacobellis v. Ohio,* 378 U.S. 184; *Schackman v. California,* 388 U.S. 454; *Memoirs v. Massachusetts,* 383 U.S. 413; *United States v. A Motion Picture Entitled "I Am Curious-Yellow"*, 404 F. 2d 196 (1968); *United States v. One Carton "491"*, 367 F. 2d 889; *United States v. A Motion Picture Film Entitled "Without a Stitch"*, (CD Cal. 69-2041-AAH).

III

Claimant is entitled to a judgment ordering the Marshall to deliver to claimant the ten reels of film consisting of two prints of "Quiet Days in Clichy."

DATED: This 9 day of July, 1970.

/s/ William P. Gray
UNITED STATES DISTRICT
JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM AND 5 WEST AMUSEMENT COMPANY,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 905

GROVE PRESS, INC., HOWARD WAGONHEIM AND 5 WEST AMUSEMENT COMPANY,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

QUESTIONS PRESENTED

I. Is the motion picture, "I Am Curious (Yellow)", obscene under the three pronged test enunciated by Mr. Justice Brennan in *Memoirs*?

II. Is the film obscene under the test proposed by Mr. Justice Harlan, Mr. Justice Blackmun, and Mr. Chief Justice Burger?

III. Is the film obscene under the test enunciated by Mr. Chief Justice Warren?

IV. Is the film obscene under the *Roth* test as defined by Mr. Justice White and Mr. Justice Clark?

V. Is the film obscene under the hard core pornography test of Mr. Justice Stewart and the absolute concept of the First Amendment adhered to by Mr. Justice Black?

VI. Is the three-pronged test a proper test for judging obscenity in any media?

VII. If the three-pronged test is a proper test, should it be applied to motion pictures as well as books?

VIII. Has Grove Press pandered the sex in the film?

IX. Is the Maryland censorship statute unconstitutional?

X. Is Maryland bound by the finding of the Second Circuit Court of Appeals?

XI. Does this Court's holding in *Stanley v. Georgia* foreclose the States from prohibiting the commercial dissemination of obscene materials?

XII. Were Appellants deprived of due process?

STATEMENT

The Maryland State Board of Censors, on July 8, 1969, disapproved an application to license the motion picture film, "I Am Curious (Yellow)", upon a finding that it was obscene, applying the standards set forth by this Court, as adopted by the Court of Appeals of Maryland. In accordance with Article 66A, Section 19, of the Annotated Code of Maryland, the Board on July 11, 1969, promptly filed a petition in the Circuit Court of Baltimore City for a judicial determination of the issue of the obscenity of the film. The case came on for hearing within the time limitations set forth in the statute, with the Board having the burden of proof in accordance with the statute. The trial court viewed the film, heard testimony of numerous witnesses over a two-week period, and viewed the film again before reaching a decision. The Court filed an order, within the

two-day period allotted by the statute, disapproving the film for licensing upon a finding that the film "is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value." An appeal was promptly entered from this judgment and order.

In accordance with the statute, the case was advanced for argument in the Court of Appeals of Maryland. The Court of Appeals, in a four to three decision, affirmed. The majority, in an opinion by Judge Finan, found that the movie was obscene under the tridentated test set forth by several justices of this Court in *"A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'" v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966). This test, although only subscribed to by three justices of this Court, has generally been referred to as the holding of this Court in that case, and it is the test which the Maryland courts have adopted. Judge Barnes concurred in the finding that all three tests had been satisfied, but he went further. He found evidence of pandering as envisaged by this Court in *Ginzburg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966). He also found that the third independent test, i.e. that the material must be "utterly without redeeming social value," is not to be applied to motion pictures, but rather that the standard adopted by this Court in *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," is the rule

governing motion pictures. The following passage in the dissenting opinion sums up the view of the minority of the Court: "Because I think the film is not 'utterly without redeeming social value,' I would (reluctantly and with regret) reverse the court below."

SUMMARY OF ARGUMENT

I-V. This Court has held that obscenity is not protected by the First Amendment, but there has been a divergence of opinion in the Court as to exactly what test and what procedure is to be employed in determining the obscenity issue. Appellee submits that the film "I Am Curious (Yellow)" is obscene under all of the tests which have been adopted by the various Justices. The film is clearly obscene under the test enunciated by Mr. Justice Harlan and subscribed to by Mr. Chief Justice Burger and Mr. Justice Blackmun. Application and adoption of this test by a majority of the Court in this case will give the States a Constitutionally sound resolution of the obscenity issue. The State action here meets the necessary requirements to assure affirmance — an accepted test for obscenity was used, and there was certainly reasonable evidence to support the State Court finding. The film is also clearly obsence under the test adopted by Mr. Justice White and Mr. Justice Clark whereby an independent social value test is not superimposed on the *Roth* standard. The alleged presence of such independent modicum of social value was the key factor not only in Judge Friendly's concurring opinion in the Second Circuit which was decisive to bring the film through customs but also in the dissent in the Maryland Court of Appeals. Without the independent application of the social value test the movie would have been held to be obscene by all the learned Judges who have considered it below. The movie is also obscene under the tridentated *Memoirs* test heretofore subscribed to by Mr. Justice Bren-

nan. This was the test employed by the trial court and the Maryland Court of Appeals in their findings that the film is obscene. These findings were based on a viewing of the film and on expert testimony as to each of the three tests. The film's extensive explicit display of a smorgasbord of sexual activity with a transparent façade of social value certainly justifies the holding of the Maryland Court. Under the hard-core pornography test of Mr. Justice Stewart we can only surmise the fellatio, cunnilingus, and multiple explicit scenes of copulation should satisfy the "I know when I see it" criteria. Consistent with the views expressed by Mr. Chief Justice Warren that a finding of obscenity by the Court below should be affirmed on appeal if supported by "sufficient" evidence, the action of the Maryland Court merits affirmance.

VI and VII. Mr. Justice Brennan's opinion in *Memoirs*, joined in by only two other members of the Court, which acted to impose an independent utterly without socially redeeming value test, has been generally accepted as the holding of the Court in that case. The three independent tests set forth in that opinion have become the standard for judging obscenity. Is this in fact the proper test? Appellee submits that it is not — a majority of this Court recognized in *Roth* that obscenity is not protected by the free speech provision of the First Amendment, and they drafted a viable test for determining the issue. A minority of the Court in *Memoirs* has effectively distorted this test so as to practically render it ineffective. The independent application of a utterly without socially redeeming value test is not warranted, and should be specifically rejected by the Court, as pointed out in the dissents of Mr. Justice White and Mr. Justice Clark in *Memoirs*. The majority *Roth* test, without its amendments by a minority of the Court, should be the test.

If our argument is rejected and the three-pronged test of *Memoirs*, is to be the standard, it should be limited to books and not applied to motion pictures. The Court has recognized that movies are of a different nature than books, and Counsel for the book distributor in *Memoirs* specifically argued that the independent social value test should be limited to books. Accordingly, we submit that the *Roth* test as originally enunciated should be applied to motion pictures and that Mr. Justice Brennan's *Memoirs* test be limited to books if it is to be given any effect at all. The movie at issue is the strongest argument for such an approach. To allow the transparent facade of social value to rescue the extensive pornographic sexual displays and thus give Constitutional protection to the movie is to reject the express holding in *Roth* that obscenity is outside the protection of the First Amendment.

VIII. The publication and dissemination of the scenario with its perverse emphasis on the sexual activity featured in the picture, in conjunction with the movie's distribution, constitutes the pandering proscribed by *Ginzburg*. The scenario speaks for itself in its emphasis on the explicit sex of the movie, and testimony at trial further developed this point. Additionally, Judge Barnes, in his concurring opinion in the Maryland Court of Appeals expressly found that the sex in the movie was being pandered by Grove Press: "It thus appears that the pandering of sex in the motion picture is generated entirely by the profit motive. By the concentration on sex in the scenario, Grove Press sells the book and by selling the book it sells the sex in the motion picture."

IX. Appellants have attacked the Maryland censorship on five grounds. This Court considered this statute in the *Freedman* case and enumerated there its constitutional defects. These defects were corrected by legislative action

and the statute as redrafted has been held to be constitutional by the Maryland Court of Appeals. That Court has held that the obscenity standard to be employed by the Censor Board pursuant to the statute is the standard set forth by this Court, and this is the standard used by the Board in judging the movie at issue and all other movies.

X. Appellants argue that the decision of the Second Circuit Court of Appeals in a federal customs case is binding on the Maryland Courts in the enforcement of the Maryland censorship law. This argument is in derogation of our federal form of government, and is based on a misconstruction of the cited case law.

XI. The primary issue in this case is the obscenity *vel non* of the film "I Am Curious (Yellow)" and the test to be applied. Appellants' *Stanley* argument is fully briefed in the *Karalexis* case now before this Court, and can best be determined there. Appellants have elected to ignore the precise holding of the Court that limited *Stanley's* effect to private possession of obscene materials and left the holding of *Roth* as viable Constitutional doctrine.

XII. There was no deprivation of due process. The attorney's work product of both parties was withheld from the other and this is in accord with established evidentiary rules.

ARGUMENT

I.

THE MOTION PICTURE, "I AM CURIOUS (YELLOW)", IS OBSCENE UNDER THE THREE-PRONGED TEST OF *MEMOIRS*.

The Court of Appeals of Maryland has heretofore adopted the three-pronged test for obscenity set forth by Mr. Justice Brennan in *Memoirs, supra.* It applied the test

in ruling on the obscenity of the subject film. The majority opinion analyzed and applied each of the three independent criteria. The thrust of the opinion is best summarized by the Court in its own words:

> "This Court has little difficulty in finding that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters. It is only with regard to the third element of the 'Roth-Alberts' tests as set forth in *A Book v. Attorney General, supra*, which must coalesce with the other two standards, which presents any occasion for pause. However, after reviewing all of the evidence in a light most favorable to the appellants' contention that the film does have something of social value, it is our judgment that it is utterly without redeeming social value."

In applying this test, it has been recognized that expert testimony is not necessary to establish the obscenity of a work when it is patently obscene. *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965); *City of Chicago v. Kimmel*, 31 Ill. 2d 202, 201 N.E. 2d 386 (1964); *Kahm v. United States*, 300 F. 2d 78 (5th Cir., 1962). *Dunn v. Maryland State Board of Censors, supra*, makes it clear that in rare cases the Censor Board can meet its burden of persuasion on the obscenity issue by merely showing the film itself. "I Am Curious (Yellow)" is such a "rare" case. It qualifies in this respect because of the extensive pornographic display of sex in the movie. Webster's New International Dictionary (2nd Edition) defines "rare" as being of an uncommon nature or quality.

The only significant case involving a movie in which the Supreme Court wrote an opinion on the issue of obscenity *vel non* rather than deciding this issue *per curiam*,

Jacobellis v. Ohio, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964), involving the movie, "The Lovers." Mr. Justice Goldberg, in a concurring opinion, described the display of sex in that movie:

> "I have viewed the film and I wish merely to add to my Brother Brennan's description that the love scene determined objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed. Except for this rapid sequence the film concerns itself with the history of an ill-matched and unhappy marriage — familiar subject in old and new novels and in current television soap operas."

Appellee submits that the pornographic display of sex in this movie qualifies it under the *Dunn* standard as the "rare case where there could be no doubt that the film is obscene . . . [in that it] not only speaks for itself but screams for all to hear that it is obscene." Sexual activity is rampant and the portrayal of a multiplicity of sex acts is absolutely without restraint. The content of the movie in this respect is vividly portrayed in the scenario (introduced as Respondent's Exhibit No. 9). The uncommon sex in the movie is: (1) Lena's singing, "In Rio de Janeiro you can fuck for free" (p. 13); (2) the display of erotic Indian sculpture depicting a man with his hand on a woman's vagina (p. 17); (3) the discussion between Lena and another girl about different methods of masturbation (p. 45); (4) Lena's dialogue, "Are you that fucking stupid?" (p. 4) and "so you don't give a shit about it, eh" (p. 55); (5) detailed love-making scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Börje caressing the girl's breasts with his tongue (pp. 71-86); (6) scene depicting sexual intercourse between Börje and Lena on the palace balustrade in which,

although the parties are clothed, the act of intercourse is vividly displayed (pp. 89, 90); (7) scenes of nudity at the retreat and scene depicting Lena looking at a sex manual showing various unusual positions for sexual intercourse (pp. 119, 120); (8) scene at the retreat showing Börje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena kissing Börje's penis as he caresses her vagina (pp. 124-129); (9) a discussion regarding sex which "makes them both horny" (pp. 133-134); (10) scene depicting intercourse in the water (pp. 139, 140); (11) scene depicting sexual intercourse in a tree between Lena and Börje (pp. 141-143); (12) scene showing fully the naked bodies of the two lying on the floor engaged in either sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation (pp. 148-150); (13) followed by a scene fully showing Börje's genitals, followed by a scene in which the nude Börje chases the nude Lena from one room to another, throws her to the floor and mounts her in a position of sexual intercourse. They then are shown with loins entangled, copulating on the floor (pp. 152-156); (14) fantasy scene in which Lena shoots Börje and castrates him with a knife (pp. 157, 158); (15) Lena's dialogue, "He is a big fucking shit and I'll kill him when I get hold of him. I'll cut off his cock" (p. 159); (16) nudity at the clinic with again an emphasis on the genital area of the male and female (p. 179).

This is the unusual and perverse display of pornography which renders this film obscene in and of itself. Judge Thomas Murphy of the United States District Court for the Southern District of New York, in the course of the case in which the jury found this film to be obscene, held the government had proved a *prima facie* case by merely

exhibiting the movie. Grove Press argued that the government's proof was insufficient as a matter of law because the government relied on the film alone and it did not offer expert testimony to prove the prurient appeal and patent offensiveness of "I Am Curious (Yellow)". Judge Murphy rejected this argument, and held that the patent offensiveness and prurient appeal of the film was so apparent that independent proof as to either category was unnecessary. He noted that the sexual scenes in "I Am Curious (Yellow)" far transcended the material in other cases, and stated:

> "Except for the claimant's experts, we doubt anyone could honestly characterize the scenes as being anything but patently offensive. To force the government to bring experts to prove that they affronted national community standards, would be like bringing samovars to Toula. In short, we hold that where material is so patently offensive and its prurient appeal to the average person so apparent, the government is not required to offer independent proof as to either category."

This holding is well supported. To the same effect, see *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177, aff'd, 388 U.S. 456, 18 L. Ed. 2d 1317, 87 S. Ct. 2109 (1967) and *People v. Pinkus*, 63 Cal. Rptr. 680 (App. Dept. Super. Ct. Cal., 1967) in which the prurient appeal and patent offensiveness of films was held to be self-demonstrating.

Landau v. Fording, supra, provides the proper standard by which to judge the movie at issue. The Supreme Court in that *per curiam* opinion affirmed the California District Court of Appeals' finding that the film, "Un Chant d'Amour", a story of prison life, was obscene. At the trial level, the State produced only the film and rested. The distributor produced a number of witnesses with impressive credentials to testify for the movie.

The trial court twice viewed the film, and notwithstanding the testimony of witnesses for the distributor found it to be obscene standing on its own merits (or demerits as it may be) without any expert testimony being necessary to establish its obscene character. The California appellate court noted that the film was obscene standing alone in that it depicted acts of male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy. In many respects, the description resembles "I Am Curious (Yellow)". There are no scenes of overt masturbation in "I Am Curious (Yellow)", but there is a discussion between Lena and another girl about various methods of masturbation, and there is a studied preoccupation with the male and female genital area. The counterparts of fellatio and oral copulation in the film at issue are in the scene where Börje throws Lena to the ground and these acts ensue. Voyeurism is rampant in this movie as is nudity. The castration scene certainly demonstrates sadism, and sodomy is a distinct possibility in one of the intercourse scenes. Additionally, "I Am Curious (Yellow)" vividly depicts six different acts of sexual intercourse in various positions and locales.

The Supreme Court, by virtue of the nature of the issue, has become the "high court of obscenity". Having found *per curiam* that "Un Chant d'Amour" is obscene because of its sexual content, even though it portends to have socially redeeming value in portraying prison life, the same reasoning would require a finding of obscenity as to "I Am Curious (Yellow)" with its facade of socially redeeming value.

Appellee, accordingly, submits that the film at issue is obscene, *per se*, and that, therefore, expert testimony is not necessary to support the finding of obscenity.

Because this Court, in previous obscenity litigation, has made it clear that it is a dangerous trial tactic for the State to rely on the material alone without expert testimony on the obscenity issue, e.g., *Memoirs, supra*, the State, although convinced that the movie is obscene, *per se*, took the precaution of producing expert testimony. Dr. Paul Yaffe, a psychologist and educator, with impressive credentials, testified as to the dominant theme of the movie and as to the issue of socially redeeming value. His conclusions were that the dominant theme of the movie was a sexual theme which would appeal to the prurient interest in sex of the average person and that the film was utterly without socially redeeming value. Reuben Kramer, an artist of wide repute, in testifying as to socially redeeming artistic value, concluded that there was none. John Lewin, a former prosecutor in the area of obscenity with some substantial background in this area, was qualified as an expert as to contemporary community standards, and testified that this film was patently offensive in its sexual display, applying those standards. Mr. William S. Forshaw, a professional librarian, with the cinema as an avocation, was tendered as a literary expert, and an expert on the motion picture media, to testify as to the dominant theme of the movie, its patent offensiveness, and the socially redeeming value issue. He found that the dominant theme of the movie was its sexual theme; that it was patently offensive by contemporary community standards; and that it was lacking in socially redeeming value. In addition, the State introduced several articles written by prominent movie critics containing poignant criticism of the movie (attached to Record Extract in Appendix). State's Exhibit No. 5 was a review by Rex Reed which appeared in the New York Times. State's Exhibit No. 7 was a commentary of Alan Adelson in the Wall Street Journal on censorship in general, and this film's significance in this respect.

State's Exhibit No. 8 was a review of the movie by James Kilpatrick in the Los Angeles Times.

Judge Joseph L. Carter, the trial judge, in commenting on the experts produced by the State, stated that he felt each of them was qualified to testify as an expert in his particular field. He found that this testimony supported the Board's conclusion that the film is obscene, tested by the most rigorous standards laid down by the various Justices of the Supreme Court of the United States and by the Court of Appeals of Maryland.

Appellants also produced a substantial amount of expert testimony in the course of the trial. This testimony should be subjected to critical analysis in determining the weight to be given it. One of the most significant aspects of all of their opinions was their universal inability to agree as to what the dominant theme of the movie was, although they all claimed that it was not sexual. A chronology of the witnesses and their opinions in this respect reveals: Dr. Mackie — the abortive love story of the girl; Dr. Johnson — the state of culture in its broadest interpretations in Sweden, and, by extension, in the western world, and perhaps by extension in the modern world in general; Dr. Mackie — the dominant theme deals with a young woman's attempt to come to grips with basic personal problems of growth; Dr. Rossi — criticism of existing society; the dominant theme says that we need a society within which people are a lot more honest with one another and that considerably more personal freedom is necessary in order for people to fulfill themselves; Dr. Paulson — disruption of contemporary society and the disruption between the generations; Dr. Brown — two predominant themes, one a presentation of Swedish life and Swedish conservatives, and the other the workout of the girl's sense of self-relationship to this Swedish life and to her environment around her; Dr.

Ehrhardt — development and portrayal of the heroine, Lena; and Mr. Stephany — three concurring themes, character development of the girl, the director of the film searching for a theme, and social unrest which exists in Sweden and almost all of the countries among all of the youth.

This confusion among the film's proponents as to what the dominant theme is, is compounded when we make reference to the expert testimony offered in the New York federal case, *United States v. A Motion Picture Entitled "I Am Curious (Yellow)"*, 404 F. 2d 196 (1968). Judge Hayes summarized the opinions of the witnesses in this respect in footnote 2 of the opinion.

This inability of Appellants' witnesses to agree on a dominant theme is accorded its proper significance by the appellate court in *Landau v. Fording, supra:*

> ". . . we think it a significant indication of the film's failure that none of the witnesses produced could agree on its dominant theme. We note that in Jacobellis, supra, in holding that the film, 'The Lovers', was not obscene, the court had no problem of ascertaining the theme or plot of the film . . .".

Added significance is given to this aspect of the case when we consider that the witnesses produced by the State as to this issue were in agreement that the dominant theme is sexual. It might well be that the experts testifying for the film, in an attempt to get away from the striking sex theme, groped for some other theme and grasped whatever they were able to conjure up — their striking lack of agreement would support such a hypothesis.

It is most important to note that the Appellant tendered no witnesses on the second of the *Memoirs* tests, i.e., whether the material in the film is patently offensive because it affronts contemporary community standards re-

lating to the depiction or representation of sexual matters. This is readily understandable in that there can be no question but that the explicit sexual displays go well beyond the community standards, whether national or local. Judge Hayes, in the 2nd Circuit case, noted: "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts." Judge Friendly, in his concurring opinion, agreed that the extensive displays of nudity and sexual activity are offensive, as did Chief Judge Lumbard in his dissent. A majority of this Court has not yet indicated whether the national or local community is the proper measure. Whether local or national, contemporary community standards, by definition, are a flexible concept. If this film is allowed to be shown, its sexual displays become the new community standard. If "I Am Curious (Yellow)" should become the contemporary community standard as to what is allowable in the display of sexual matters, there can be no restraint upon pornography in motion pictures. In such event, the holding of this Court in *Roth and Jacobellis* that obscenity is not protected by the First Amendment will become empty and meaningless. The new contemporary community standards that would prevail if the subject film is found not to be obscene would sanction the explicit showing of male and female genitals, the depiction of cunnilingus, and fellatio and other perverted practices, and the depiction of intercourse between man and woman shown fully nude in a variety of positions and locales. This film runs the full course of sexual activity excepting certain deviant sex. With this film as the standard, and applying the principle that the three elements must coalesce, a film can be wholly devoted to sex (the

dominant theme area), and it can be utterly without socially redeeming value, but it still cannot be censored because there are no longer any community standard limits on the display of sex. Appellants have avoided this issue, but it must be considered by this Court. If restraint on obscenity in motion pictures is to be a viable concept, this movie must not be awarded the protection of the First Amendment.

Appellants' only argument as to the second of the three-pronged tests is that because a great number of people have seen the movie, this indicates that it is acceptable by contemporary community standards. Concededly, a great number of people have seen the movie — curious people interested in why this movie has raised such a furor — but this is not indicative that the community, national or local, does not find the sexual display to be offensive. The substantial amount of litigation directed against the movie throughout the country noted in the Appendix to Appellants' Brief demonstrates the popular reaction to the patent offensiveness of the movie. They might go see the movie in order to satisfy their curiosity, but this does not in any way indicate that they readily accept the pernicious sexual smorgasbord to which they are subjected. To view the extremism of "I Am Curious (Yellow)" is one thing, but to accept its insult to morality as a prevailing contemporary standard is something else again.

Several of Appellants' witnesses testified that the director is a serious artist — serious, Appellee would submit, upon making sexually provocative movies in order to reap the benefits at the box office. Assuming, *arguendo*, that he is a serious artist with serious artistic intent in making this movie, this is in no way determinative. Again, reference is made to *Landau v. Fording, supra*, for the governing law. The Court there noted:

> "The fact that the writer, director, and producer of the film, Jean Genet, is a French writer of renown does not, as appellant argues, settle the question of whether the film contains sufficient artistic merit. Great artists can create the type of 'hard-core' pornography proscribed by our statute."

Several of Appellants' witnesses testified that the film is strongly put together and that it is a meaningful, cohesive, artistic production. This is belied by the rather humorous commentary by Rex Reed in his Review (State's Exhibit No. 5) in the New York Times, *supra*, concerning a screening of the movie for critics where a reel was left out; this was noticed by the projectionist, and the reel was shown at the conclusion of the film. The critics were unable to determine where the reel was to fall in the logical sequence of events.

This Court has the opportunity to see this movie as part of these judicial proceedings. The viewing is necessary if the *de novo* review, as contemplated by Mr. Justice Brennan's *Memoirs* test, is to be undertaken. This will give the Court the opportunity to apply sound judicial reasoning and concomitant common sense to Dr. Mackie's statement that without the sexual scenes the movie would be "spotty" and would "verge on incoherence"; Dr. Rossi's statement that the film would not be an honest one without the sex scenes; Dr. Paulson's testimony that each and every one of the sexual encounters was necessary in order to develop the dominant theme which he found in the film; Dr. Ehrhardt's testimony that it was necessary to show the sex scenes in detail to show all aspects of the girl's personality and that the display of sex in the movie would not be at all shocking to the average person; and Mr. Stephany's testimony that without the sex scenes the film would be destroyed. This expert testimony is in the record for this

Court to consider. By the nature of these proceedings, in the context of the three-pronged test, this Court is put in the position of judging anew the credibility of such statements. Appellee submits that these witnesses, in overzealous advocacy of freedom in the arts, have made assertions which are absurd and to which this Court should not give credence.

Witnesses such as Dr. Johnson start from the premise that freedom of expression in the arts is an absolute concept. Any opinion as to the merit of a particular movie must, therefore, necessarily be biased. Such so-called experts do not accept the holdings of this Court that pornography is not protected by the First Amendment. Appellee urges the Court to consider these elements in evaluating the testimony of some of Appellants' witnesses.[1]

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[1] Compare the testimony of the witnesses for the movie in the Boston case, *Commonwealth of Massachusetts v. Karalexis, et al.*, No. 43068/69/70/71 (Suffolk Superior Court), as noted by Judge Tauro in footnote 8 of his well-reasoned opinion:

> "In expanding upon their positions, some defense witnesses stated that sexual intercourse upon the stage by actors in a dramatic presentation would be acceptable; that no limitation should be placed upon explicit portrayals of deviant or normal sexual activity in films; that college students should not be prevented from producing films containing scenes of nudity, oral-genital contacts and, at least, simulated intercourse; that prurient sexual activity should be limited to those acts involving violence or lack of consent and that the area of legitimate state interest should be limited to protecting individuals from physical attack or unwanted intrusions on their privacy. One witness stated that if a detailed and brutal seduction scene from the constitutionally protected book, 'Fanny Hill', were portrayed in a film, it would be 'boring' and 'an extraordinarily dull scene' but should not be prohibited.
>
> "Several defense witnesses testified that exhibition of 'I Am Curious (Yellow)' to minors should not be proscribed. One held that college students should not be prohibited from making films containing explicit sexual scenes, including fornication. Another advocated sexual experimentation of the sort indulged in by Lena. She maintained that the universal practice of free

Another factor to consider in evaluating their testimony is the observation in the opinion of Judge Carter in the court below that the witnesses "were certainly adequate to testify as to the opinion and thinking of persons of such high intellectual standards, but I am not certain that they were aware of the attitude of the average person with respect to the problems involved in this case." For instance, Dr. Rossi characterized himself as an average person, for purposes of applying the prevailing standards to this movie; Appellee submits that a college professor is not the average person envisioned by *Roth*.

The respective witnesses were asked whether they would let their younger children see the movie. The representative responses were that the 13- and 15-year-old children of the witnesses would be permitted to see the movie. Appellee urges that it is obvious that this would not be the reaction of the average person. Witnesses for the Appellants were asked generally about the effects upon young people seeing the movie. The State does not contend, and has not contended at any time during these proceedings, that a movie should be censored merely because it would be offensive to minors. Any argument along these lines was put finally to rest by this Court in *Butler v. Michigan*, 352 U.S. 380, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957). The testimony in this respect is important, however, because it establishes at the very least the offensive elements of the movie. When a witness says the movie should not be seen by someone under eighteen, but that

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love both before and after marriage would benefit society even if it resulted in 'illegitimate children'.

"It was contended that not even the inclusion of the rankest porongraphy could affect the film's social value. It was also conceded that the gradual acceleration of sexual explicitness in films could lead to widespread vulgarity, an undesirable consequence for American life and a reflection of the staleness of Swedish life."

it may be seen by someone over that age, his reasons for the distinction require explanation.

Appellant, in the proceedings before the Maryland Court of Appeals in a footnote to their brief, objected to a statement in Judge Lumbard's dissent in the 2nd Circuit case, *United States v. A Motion Picture Entitled "I Am Curious Yellow", supra.* They have elected to ignore that issue in these proceedings, but Appellee feels that this Court should be apprised of it as bearing on the serious artistic intent of the director and Grove Press. Judge Lumbard's statement was:

> "The excerpts from the director's diary which were published in Sweden emphasize sex and the breaking away from old cliches about sex. The diary makes no mention whatever of any of the aspects of the film which it is claimed give it redeeming social value — the class structure in Sweden, ideas of non-violence and the like."

Judge Lumbard's reference is to two excerpts from the diary introduced into evidence by the government. The evidence in the federal case was that these two extracts from the diary were the two which the director had translated initially for promotional use in distributing the film. It was also established that they were given to Barney Rosset, the president of Grove Press, for use in promoting the movie. The two extracts contain exclusively the portions of the diary that deal with the sexual aspects of the movie — they make no reference to anything in the movie except the development of the sexual theme. This evidence is very enlightening as to what emphasis this "serious" director put on the film, as Judge Lumbard noted. This evidence supports the conclusion that the claims of value now made for the film are spurious, and that the nonsexual portions of the film — the man-in-the-street interviews, picketing, political discussions and non-violent exercises —

are window-dressing, a vehicle for presenting the scenes of sexual conduct and nudity. The government, in introducing extracts from the diary was not, as intimated by Appellants, unfairly emphasizing the sexual aspects of the diary, but rather it was bringing to the Court's attention the emphasis placed on these aspects by the director and distributor, and the use of the sex in the movie in its promotion.

Before leaving the issue of obscenity of the film under the three-pronged test, it should be noted that the Bench has perforce acquired and developed expertise in the field of obscenity by virtue of the exercise of an independent exercise of constitutional judgment at each level. Appellee would sum up its argument under the *Memoirs* standards by quoting several judicial opinions regarding "I Am Curious (Yellow)". Judge Thomas F. Murphy, in the federal customs case, ruling on the motion of Grove Press for summary judgment, stated:

> "The film was exhibited to me on April 10, 1968. To me it was repulsive and revolting, the sexual scenes having no relationship to the story line or plot — if there was one. These sexual scenes ranged from copulating in a tree; copulating astride a balustrade of a public building and in the nude in a room; with other scenes of buggery, cunnilinction and fellatio, all in the nude. The final scene, in conformity to the dominant theme, shows the female lead performing an orchiectomy or peotomy or both on her murdered lover with a kitchen carving knife.
>
> "If the film has a message, whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hard core pornography. *Cf. Landau v. Fording, ... [supra].* In my opinion, the average person applying community standards would find that the dominant theme taken as a

whole, appeals to prurient interest, is insulting to the American public and is devoid of social value. . . ."

United States v. A Movie Entitled "I Am Curious (Yellow)" 285 F. Supp. 465, 472 (1968).

Judge Lumbard, in his dissent in the 2nd Circuit, stated:

"Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

"While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest. Nor is it persuasive that the explicit sex scenes take only about 10 minutes out of 120. The enormous visual impact of a motion picture as distinguished from other media cannot be disregarded. *Cf., Freedman v. Maryland*, 380 U.S. 51, 61, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). The combination of sight and sound, in the darkness of the movie theater, result in a uniquely forceful impact on the audience. Because of the nature of this medium, sexual scenes in a motion picture may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine."

Appellants' bland assertion that the film is plainly not obscene, applying the three-pronged test, is easily refuted. The film was found to be obscene by a jury in the United States District Court for the Southern District of New York. It was found to be obscene in an in depth, well-

reasoned opinion by Judge G. Joseph Tauro, Chief Justice of the Superior Court in Boston. It was found to be obscene by Judge Herbert W. Walton in a State court proceeding in Johnson County, Kansas; by Judge John H. Lucas in a State court proceeding in Kansas City, Missouri; by Judge John J. Lally in a State court proceeding in Spokane, Washington; and by Judge Paul LaPrade in a State court proceeding in Maricopa County, Arizona. It was found to be obscene by a three-judge Federal court in the United States District Court for the District of Kansas. It was found to be obscene by a Maryland trial court and the Court of Appeals of Maryland. The foregoing list is not exhaustive.

These judicial findings of obscenity are supported by well-reasoned opinions, and we incorporate them by reference into this brief. It must be noted that each of the judicial findings of obscenity was made by applying the three tests enunciated by Mr. Justice Brennan in *Memoirs*. This is one of the most stringent of the varying tests for obscenity which some members of the Court have enunciated, and it is not at all clear that it is the proper test to be applied, particularly to motion pictures.

II.

THE FILM IS OBSCENE UNDER THE TEST ENUNCIATED BY MR. JUSTICE HARLAN, MR. JUSTICE BLACKMUN, AND MR. CHIEF JUSTICE BURGER.

Mr. Justice Harlan set forth a well-reasoned test for obscenity in *Roth v. United States*, *supra*, which he has consistently followed in subsequent obscenity litigation. See *Roth*, *supra*, at 496; *Manual Enterprises v. Day*, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432 (1962); *Jacobellis v. Ohio*, *supra*, at 203; *Memoirs v. Massachusetts*, *supra*, at 455; *Interstate Circuit v. Dallas*, 390 U.S. 676, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968). This view is essentially that all

material is constitutionally protected at the federal level except hard core pornography; material may be suppressed at the state level if reasonable evidence supports a finding that it treats sex in a fundamentally offensive matter under rationally established criteria for judging such material. As Mr. Justice Harlan said in *Memoirs, supra*, at 458, is:

> "From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury consider such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions."

The rationale supporting this view has been eloquently restated by Mr. Justice Harlan in each of the cited cases and is well known to the members of this Court. No useful purpose can be served by paraphrasing Mr. Justice Harlan's opinion in this respect. We urge, that Mr. Justice Harlan's approach to this issue of obscenity is a constitutionally sound approach and should be adopted by at least a majority of the Court. Chief Justice Burger's opinions in *Cain v. Kentucky*, No. 347, Oct. Term, 1969, decided March 23, 1970, U.S. , 25 L. Ed. 2d 334, 90 S. Ct. 1110; *Carlos v. New York*, No. 524, Oct. Term, 1969, decided December 8, 1969, U.S. , 24 L. Ed. 2d 303, 90 S. Ct. 395; and *Walker v. Ohio*, No. 1470, Oct. Term, 1969, decided June 15, 1970, U.S. , 26 L. Ed. 2d 385, 90 S. Ct. 1884, and Mr. Justice Blackmun's opinion in *Hoyt v. Minnesota*, No. 1544, Oct. Term, 1969, decided June 29, 1970, 26 L. Ed. 2d 782, 90 S. Ct. 2241 evidence a concurrence in Mr. Justice Harlan's position, and hopefully indicates that the Court is moving toward acceptance of this position.

Appellants argue that this test cannot be applied for two reasons (1) the Maryland Court did not apply local standards, and (2) the test is inappropriate for nationally distributed materials. The testimony of Mr. Forshaw and Mr. Lewin, the State's witnesses, and the only witnesses who testified on the issue of community standards, was to the effect that the movie was patently offensive in its depiction of sex as measured by both national and local standards. The lower court and the Maryland Court of Appeals found that the movie satisfied this independent *Memoirs* test of obscenity without delineating whether a national or local standard was the measure. The Court did not find it necessary to differentiate between the two and the finding must therefore, by necessity, encompass both. Even if the finding were limited to national standards this would lend no substance to Appellant's argument; Mr. Justice Harlan requires only that rational criteria be used and the imposition of either a national or local standard would satisfy this requirement. Appellants' second argument for rejection of the test flies in the face of the fact that Mr. Justice Harlan, Mr. Justice Blackmun, and Mr. Chief Justice Burger have adopted it specifically in the context of nationally distributed motion pictures.

What is the result of applying Mr. Justice Harlan's criteria to the instant case? This case comes on appeal to this Court from a State court. The Maryland Court of Appeals affirmed the decision of a trial court which had affirmed the administrative decision of the Maryland Motion Picture Censor Board that the subject film is obscene. Accordingly, the issue is (1) whether in the State proceedings rational criteria were employed in judging the obscenity of the movie, and (2) whether there is reasonable evidence in the record to support the State's findings; or as stated by Mr. Justice Harlan in *Interstate Circuit v.*

Dallas, supra, at 748, is this an instance "where the state action clearly appears to be but the product of prudish overzealousness".

The criteria employed at the State level in the determination of the obscenity issue was the three-pronged test of *Memoirs, supra*. Mr. Justice Harlan has not required that such a stringent test be imposed by the states; but in imposing this stringent test, Maryland has more than satisfied the minimum requirement for State regulation of obscenity.

The Appellee urges that the record before this Court contains ample evidence to support the Maryland Court of Appeals' conclusion that the film is obscene so as to satisfy the reasonable evidence requirement, Mr. Justice Harlan's other "test" on review.

III.

THE FILM IS OBSCENE UNDER THE TEST ENUNCIATED BY MR. CHIEF JUSTICE WARREN.

Chief Justice Warren joined with Mr. Justice Brennan in his controversial opinion in *Memoirs, supra*, which has acted to expand the prurient interest test of *Roth* to the three-pronged test enunciated there. An important distinction, however, is present in Chief Justice Warren's approach to the obscenity issue. He held that Supreme Court review should be limited to the record and should not involve an independent *de novo* judgment on the question of obscenity. In *Jacobellis v. Ohio, supra*, at 202-203, he stated:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: Material is obscene and not constitutionally protected against regulation and proscription if 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. I would commit

the enforcement of this rule to the appropriate state and federal courts, and I would accept their judgments made pursuant to the *Roth* rule, limiting myself to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene. *Cf. Thompson v. City of Louisville*, 362 U.S. 199. But since a mere modicum of evidence may satisfy a 'no evidence' standard, I am unwilling to give the important constitutional right of free expression such limited protection. However, protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent *de novo* judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a 'sufficient evidence' standard of review — requiring something more than merely any evidence but something less than 'substantial evidence on the record [including the allegedly obscene material] as a whole.' *Cf. Universal Camera Corp. v. Labor Board*, 340 U.S. 474. This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation."

This test requiring "sufficient evidence" is met in this case. The trial court viewed the film, heard numerous experts on both sides of the obscenity issue, and reached a conclusion based on the viewing and his assessment as to the credibility of the witnesses and the weight that should be accorded to their testimony. The substantial evidence which more than supports his finding of obscenity is: first and foremost, the movie itself with its perverse dis-

play of, and emphasis upon, explicit sexual activity; and secondly, the supporting testimony of the State's witnesses to the effect that the movie amply satisfied each element of the *Memoirs* test for obscenity — the judge evidently gave credence to this testimony as opposed to that offered by the film's advocates.

The Court of Appeals undertook a *de novo* review of the evidence in arriving at its conclusion as to the film's obscenity. That Court viewed the film and analyzed the testimony, not with the idea of reviewing the lower court's findings in accordance with the "sufficient" evidence theory, but rather in accordance with Mr. Justice Brennan's dictate to make an independent constitutional judgment on the facts of the case, that is, all the evidence in the case. *Jacobellis v. Ohio, supra*, at 190. The majority of the Court of Appeals found the movie to be obscene.

Pursuant to the Warren theory of review, the Maryland Court of Appeals need not have made an independent judgment. The fact that they did makes the State's case stronger as to the application of the "sufficient" evidence formula. All evidence, considered *de novo*, convinced the majority of the Court of Appeals that the movie is obscene. Under the Warren theory of review, this Court need only consider the State's evidence and the allegedly obscene material. If these, considered together, amount to "sufficient" evidence, affirmance is in order. Appellee submits that the "sufficient" evidence test is clearly satisfied here.

It is respectfully urged that if the Warren theory of review had been employed by the Maryland Court of Appeals, there would have been a unanimous affirmance of the lower court. The Warren approach has much to recommend it. If there has been full consideration of the obscenity issue by a State court, applying the proper standards,

this Court ought not to assume the role of a trial court and make independent findings as to the credibility and weight of testimony of the witnesses who testified at the trial? Surely the movie may be seen, as suggested by Chief Justice Warren, but need the testimony of each witness in the record be read by each Justice so that he can form an independent subjective judgment? Why are the states not to be trusted in this area? Why should this Court be the "Super Censor of all the obscenity purveyed throughout the Nation?" If there is "sufficient evidence" in the record to support the State court finding, it should be affirmed.

IV.

THE FILM IS OBSCENE UNDER THE *ROTH* TEST AS DEFINED BY MR. JUSTICE WHITE AND MR. JUSTICE CLARK.

Mr. Justice White and Mr. Justice Clark noted in separate dissents in *Memoirs v. Massachusetts, supra*, that the *Roth* test as originally enunciated is controlling and that the imposition of an independent social value test as proposed in Mr. Justice Brennan's opinion, is not proper. They noted that "social importance" is not an independent test of obscenity, but is relevant only to determining the prurient appeal of the material.

Among the courts which have been called upon to decide whether "I Am Curious (Yellow)" is an obscene film it has been adjudged not obscene only upon a finding that the film cannot be said to be "utterly without redeeming social value". The 2nd Circuit reversal in *United States v. A Motion Picture Entitled "I Am Curious (Yellow)", supra*, was by a two-to-one vote. Judge Friendly, in concurring, noted that if he were to be persuaded that the *Roth* standard without an independent social value test was the controlling law, he would hold the film to be obscene. The author of the dissenting opinion (two judges concurring)

in the Maryland Court of Appeals stated as his reason for holding the film not to be obscene: "Because I think this film is not *'utterly* without redeeming social value', I would (reluctantly and with regret) reverse the court below." The dissenting judges stated their understanding of the law to be that "a motion picture will be constitutionally protected if there is a mere *presence* of matters of social importance even though the matter may, in fact, be outweighed by the film's prurient appeal" (emphasis included in original). The trial judge in the New Jersey case, cited in Appendix A of Appellants' Reply Memorandum to Appellee's Motion to Dismiss or Affirm, applied the three tests independently and found the film to be obscene under the first two criteria, but found it to be not obscene because he felt that the social value test applied independently established a "modicum of social value".

The independent application of the social value test is the crutch Appellants have used and continue to use to foist this obscene picture on the American public. The 2nd Circuit's division of opinion on this issue opened the latch for the dissemination of the film. We argued, and the Court of Appeals of Maryland held, that the movie was obscene under the three-pronged test applied independently. There can be little question but that the film is even more conclusively obscene if the "social value" test is not applied independently as Mr. Justice White and Mr. Justice Clark stated it should not be.

V.

THE FILM IS OBSCENE UNDER THE HARD CORE PORNOGRAPHY TEST OF MR. JUSTICE STEWART AND UNDER MR. JUSTICE BLACK'S ABSOLUTE CONCEPT OF THE FIRST AMENDMENT.

Mr. Justice Stewart noted in *Jacobellis v. Ohio, supra,* at 197, that all material is constitutionally protected at both the federal and state level except hard core pornography. His definition of hard core pornography at that time was:

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." In his dissent in *Ginzburg v. United States*, *supra*, at 499, Mr. Justice Stewart borrowed the following description from the Solicitor General's brief to indicate what may be considered hard core pornography. This was the definition:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment . . .".

Another definition particularly appropriate in this context is the description of the types of material constituting hard core pornography in the Solicitor General's brief in the *Roth* case, Brief for the United States, pp. 37-38, *Roth v. United States*, *supra*.

> "The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer can-

> not easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Mr. Justice Harlan, in *Memoirs, supra,* at 457, defined hard core pornography as "that prurient material that is patently offensive or whose indecency is self-demonstrating."

There can be little doubt that the run of the mill stag film is hard core pornography under any of the tests. What then is the effect of having stag film sequences liberally interspersed throughout an otherwise innocuous movie? Explicit scenes of male and female copulation in a variety of positions and locales, with genitals fully exposed and vivid portrayals of cunnilingus, sodomy, and fellatio cannot lose their character as hard core pornography. The fact that they are interspersed throughout the movie heightens their effect rather than diminishes it. This is cogently set forth in Chief Judge Lumbard's opinion in the 2nd Circuit:

> "The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge."

If the subject film is not deemed hard core pornography, the onus of legal obscenity may be erased from the vilest stag film by simply including a redemptive device or two. "I Am Curious (Yellow)" is a far cry from "The Lovers" which evoked the response that "I know it [hard core pornography] when I see it, and the motion picture involved in this case is not that." "I Am Curious (Yellow)" squarely presents the question whether hard core pornography, with a little window dressing, is to be protected as free speech or is to be rejected in accordance with *Roth* as obscenity "not within the area of constitution-

ally protected speech or press." Appellee submits that the concept of hard core pornography as set forth in prior opinions of this Court does encompass this movie; but if we are mistaken in this premise, we ask that consideration be given to expanding the concept in order that *Roth's* holding excluding obscenity may be given substance.

We cannot leave the issue of obscenity *vel non* without at least an effort to convince Mr. Justice Black that the movie is obscene, even within the context of his absolute concept of the First Amendment. We are not unaware that Mr. Justice Black joined in with Mr. Justice Douglas in a concurring opinion in *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965), to the effect that "movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression", but we ask that this statement be reviewed in the light of his statement in the *Roth* dissent, that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." It can be assumed that this exception would encompass suppression of an actual act of fellatio performed by live participants on a theater stage as being violative of a state perverted practice statute. Why can't the exception also cover such an act performed on the motion picture screen? This conduct concept as applied to movies is discussed, *infra*, and we only ask that Mr. Justice Black give it fair consideration in the context of this movie with its vivid portrayal of numerous and varied sexual encounters.

VI.

THE THREE-PRONGED TEST IS NOT THE PROPER TEST FOR JUDGING OBSCENITY IN ANY MEDIA.

In recent obscenity decisions, lower courts, including the Maryland Court of Appeals (and the Maryland Motion Picture Censor Board), have proceeded on the assumption

that the *Roth* test of 1957 has been "modified" since it was originally handed down. They read the law as requiring:

(1) that the dominant theme of the material, taken as a whole, must appeal to the prurient interest in sex of the average person;

(2) that the material must be "patently offensive" by contemporary community standards;

(3) that the material must be "utterly without redeeming social value".

But should such assumption be made? The *Roth* case was the only one where a majority of this Court agreed on any test; and in that case, the Court said:

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas . . . having even the slightest redeeming social importance have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire*. . . . 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Supreme Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The Court then set out what has been referred to as the *Roth* test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest".

When and in what manner did the other two tests, i.e., (a) material must be "patently offensive" and (b) it must be "utterly without redeeming social value" purportedly come into the law?

The "patently offensive test" came from the opinion of Mr. Justice Harlan in *Manual Enterprises v. Day, supra.* This "test", however, only received the concurrence of Mr. Justice Stewart in that case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons, and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan. Mr. Justice Black concurred in the result without opinion; Mr. Justice Clark dissented and filed a dissenting opinion. Mr. Justice White and Mr. Justice Frankfurter took no part in the decision. A review of subsequent cases does not indicate that a majority of the Supreme Court has committed itself in any one case to the "patently offensive" test. Hence, the doctrine of *stare decisis* does not commit the Supreme Court to the "patently offensive" test.

The "*utterly* without redeeming social value test" (emphasis supplied) as applied to motion pictures apparently came from the opinion of Mr. Justice Brennan in *Jacobellis v. Ohio, supra,* involving the French motion picture "Les Amants" ("The Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion, Messrs. Justices Black, Douglas, White, and Stewart, concerning in the judgment only. Mr. Justice Harlan dissented, as did Mr. Chief Justice Warren and Mr. Justice Clark, so that this "test" did not receive the approval of a majority of the Supreme Court.

The third "test" was introduced into the law by the decision in *Memoirs, supra,* in 1966. But again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, Mr. Justice White and Mr. Justice Harlan, in separate dissenting opinions in *Memoirs* observed that the social value test was "novel" and that only *three* members of the Supreme Court held to it. They further pointed out that such a test *rejects* the *Roth* test to which, as above indicated, a *majority* of the Supreme Court *did agree.*

Even in the case of *Redrup v. New York,* 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), the *per curiam* opinion of this Court was careful to state that the necessity of meeting the three-point test was a view held *only* by certain justices in *Memoirs. Redrup* did not cite the three-point test as the test of the Supreme Court.

The Court's holding in *Roth* that obscenity is not protected by the First Amendment because it is "utterly without redeeming social importance" has been rendered ineffective by the three-pronged test which would give license to any material with a modicum of social value. Certainly any material with minimal social value is not automatically imbued with social importance.

Appellees submits that "social value" is not the correct standard, but rather that "social importance" should be the measure. Appellee further submits that the issue whether there is "social importance" is not an independent test of obscenity, but is relevant only in determining the predominant prurient interest of the material. The minority opinion of Mr. Justice Brennan in *Memoirs* has somehow been generally accepted as setting forth the con-

trolling rule of obscenity both as to books and movies. This is the wrong test to judge the obscenity of any material, as has been noted by pursuasive authority. Judge Tauro in the *Karalexis* case, *supra*,[2] Judge Barnes in his concurring opinion in the court below, and the Kentucky Supreme Court in *Cain v. Kentucky*, 437 S.W. 2d 769 (1969), reversed on other grounds by this Court in No. 347, October Term, 1969, have held that the *Roth* test without its subsequent extensions by a minority of the Court is the only proper and controlling test for judging obscenity.

VII.

IF THE MEMOIRS TEST IS AT ALL APPLICABLE IT SHOULD BE LIMITED TO BOOKS, AND DIFFERENT STANDARDS OF OBSCENITY SHOULD BE APPLIED TO MOTION PICTURES.

Even if we are to accept the standard of *Memoirs* with its independent "utterly without socially redeeming value" test, it does not follow that this test should be applied to motion pictures. The test was enunciated in a case involving books, and if it is at all valid, it should only apply to books. Therefore, if the Court were to apply the three-pronged test of *Memoirs* and arrive at the conclusion that the film is not constitutionally obscene under these standards, it should take into consideration whether these standards, especially the "utterly without socially redeeming value" test, are properly applicable to motion pictures.[3]

This Court and numerous other courts have noted a difference between movies and novels in the obscenity context.

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[2] Judge Tauro also pointed out in detail the inherent contradiction in the independent application of an independent "utterly without socially redeeming value" test.

[3] For an excellent discussion justifying the application of a different standard to motion pictures see Randall, "Censorship Of The Movies", University of Wisconsin Press, (1968) pp. 66-70.

As early as 1952, when this Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("The Miracle") in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952), Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, JJ., concurring; there were no dissents) noted the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (343 U.S. at 502-503, 72 S. Ct. at 781, 96 L. Ed. at 1106).

Mr. Justice Clark, in his concurring opinion in *Kingsley Pictures Corp. v. Regents* ("Lady Chatterley's Lover"), 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959), stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'." (Emphasis in original).

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman v. Maryland, supra:*

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Judge Hays in the 2nd Circuit case involving the film in this case, in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books" (404 F. 2d at 198).

In the state courts, the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau v. Fording, supra*, the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland, supra*). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal. L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J. supra, at p. 708).
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> "Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." Id. at 181.

This statement by the California Appellee Court is given added significance by the fact that the obscenity finding

in *Landau* was affirmed by this Court. Further recognition of the difference between motion pictures and books as far as obscenity is concerned is reflected in the majority and concurring opinions below.

It is also most interesting to note the position the Appellant, G. P. Putnam's Sons, took as to this issue in the *Memoirs* case. That position, as set forth in their brief, was that the "social value" test should be limited to books. The argument was repeated and explained in a recent book by Charles Rembar, counsel who represented G. P. Putnam's Sons in *Memoirs*. He was counsel for the Appellant here, Grove Press, in litigation concerning the books, "Lady Chatterley's Lover" and "Tropic of Cancer". The book entitled "The End of Obscenity" was published in 1968 by Random House. Mr. Rembar, on pages 436 through 441, presents a strong argument for limiting the "social value" test to books — an argument which conceivably induced certain members of this Court to adopt social value as an independent test. This argument of the lawyer for Grove Press, representing G. P. Putnam's Sons in *Memoirs*, has significance in the case at bar and should be brought to the Court's attention:

> "The final problem in writing the brief (save one that I will discuss in a later chapter because my decision was not to deal with it in the brief at all) was not raised either by the court below or by our opponents. It had to do with whether the value test could operate in all situations and for all forms of expression. Up to this point I had never spoken of possible exceptions, nor did the language of *Roth* on which we relied suggest any. Though the problem had been on my mind, it was not something that I had thought it necessary, or desirable, to discuss. But now, I felt, it had to be dealt with, to some extent at least; the Supreme Court might be undertaking a fundamental review of the law, and nine agile intellects would be ranging over the field of obscenity.

"The value test had a valid conceptual basis in the First Amendment and a valid precedential basis in *Roth*, and it worked well — made practical sense — in the cases where we had sought to apply it. Yet one could conceive of situations where, though the test by its terms might seem to invoke the guaranty, the Court would certainly approve suppression. Let us assume a play in which an act of sex is performed (performed, not suggested). Let us also assume the play has dramatic merit. To make the point plain, let us finally assume it is broadcast on network television. (The reader may make his own choice of the particular variety of sexual act, and of whether the broadcast would be in black-and-white or living color.)

"I did not want to undertake a specific discussion of hypotheticals such as this. My opponents in the various cases had not brought them up. They did not argue that the value theory should be rejected because in some areas it was unworkable. Rather, they urged that *Memoirs* itself failed the value test (as the attorney general contended), or that there was no such thing as a value test (as the Citizens for Decent Literature were to contend). It would hardly be wise to spell out an argument against our position that our opponents were not making. Nevertheless, either during the hearing or in the Justices' private thinking, horror examples might come into their deliberations. I wanted to suggest a solution without posing the problem.

"There were two things in the brief that I hoped would serve the purpose. One was the distinction between expression and conduct. The imaginary television show I described involves performance and public audiences. It may be true that the performers have something to communicate, and that to this extent expression would be silenced, but the situation may fairly be regarded as in its essence action. The Court had sanctioned the impairment of communication where elements of action were present; it had, for example, approved restrictions on parades, and on

the use of 'loud and raucous' sound trucks, and on salesmen calling without invitation. A defendant charged with indecent exposure — in the streets, not on the stage — might also argue that his effort is to communicate, and no doubt it is.

"Having drawn on the distinction between expression and conduct, I then suggested that another kind of distinction might be appropriate — among different forms of expression. Again, I did not offer it as a reply to something said on the other side, but rather as an affirmative part of our own argument, an additional reason for giving new freedom to writers. The final paragraphs of the brief were these:

> 'It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.
>
> 'The audience for a book is the individual reader, not an assembled group. In a theater audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems. (The familiar hypothetical from another area of restraint — shouting "Fire!" in a theater — would hardly present a problem if there were only one other person in the theater.) Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication — the sound truck, for example, or the advertising poster in a train or bus — make us their captive. Television, the great new medium of our time, presents both aspects:

its communications are usually received in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

'There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

'At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

'Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

'Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value — "literary or scientific or artistic." The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that in a case where value is proven, a book may not be destroyed. That is the case before the Court.'

"If the television example and other *casus horribiles* should occur to Justices, these paragraphs would serve as a reminder that they involve modes of communication other than books. If one of the insupportable hypotheticals should someday become real, the Court could distinguish its *Fanny Hill* decision (assuming it was a decision in our favor) on the ground that the uncompromising social-value test had gained acceptance in a case that involved a book.

"There was no precedent for separating media of expression but neither was there precedent that stood in the way. The Court had declared motion pictures protected by the First Amendment, but whatever statements had been made by individual Justices, the Court had not ruled — there had been no case presenting the question — that motion pictures are entitled to protection in the same way or to the same extent as books. Nor does it follow. It would not follow even from Black's absolute view of the First Amendment. Black's premise is that the Amendment is to be taken literally. The Amendment states, the reader will recall, that 'Congress shall make no law . . . abridging

the freedom of speech, or of the press . . .' Black's appealing argument is that 'no law abridging' means 'no law abridging'. The majority's answer to Black, that the First Amendment had never been construed to confer an unlimited freedom, had behind it massive authority and little logic; it represented a conclusion, not a reason.

"But there is another answer where the books are not involved, one that Black might accept. If the Amendment is to be given a literal reading, then it may be said that films, and other art forms that are not entirely verbal, are not literally speech or the press. On the other hand, once 'speech' and 'the press' are expanded beyond their plain meanings, we are not reading the amendment literally; if that is the way the game of interpretation is to be played, then a converse liberty may justly be taken with the word 'abridging'. The Amendment's prohibition against law-making need not be imposed strictly where what the law affects is not strictly speech or the press.

"The extreme situations could thus be accounted for, whether the First Amendment is to be given a literal construction or the traditional loose construction. Two members of the Court subscribed to the literal construction, and of the others, there were three or four who I hoped would accept the value test; the two groups taken together would make a majority. It was that majority for whom, if they should be troubled by cases not present but envisioned, it was necessary to provide solutions.

"I was of course not interested in suggesting candidates for censorship. But I was speaking to a Court which, as I saw it, had not the slightest idea of granting complete freedom for everything that might be called expression. I was saying that situations for which it might think anti-obscenity laws altogether fitting were different from ours; the precedent the Justices would set by ruling in our favor, need not in future cases haunt them. Remote regions of constitutional law did not have to be mapped in detail. It was

> enough to point out that distinctions among modes of communication were permissible, that the Court's opinion need not state a single rule for all of them, and that the printed word was entitled to the greatest freedom. What the attorney general had proceeded against was the printed word."

The thrust of the cited argument is that the independent social value test is peculiarly applicable to books, and is not an appropriate gauge for stage shows or movies. Some members of this Court accepted the test in this context. Now Appellants here would ask this Court to forget the argument in *Memoirs* that the "social value" test be limited to books. The patent contradiction of this approach brands it as devoid of merit.

Appellee submits that "I Am Curious (Yellow)" is one of the *casus horribiles* referred to by Mr. Rembar. It is one of the "unsupportable hypotheticals" that has "someday become real". Appellee would accordingly urge that Mr. Rembar's suggestion be adopted and the "uncompromising social value test", if it is to be considered at all applicable, be distinguished on the ground that it "had gained acceptance in a case that involved a book."

This Court's recognition that movies warrant different treatment than books was again emphasized in the eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967. In each case the Court granted certiorari and summarily reversed an obscenity conviction citing *Redrup* as its sole authority. Three of the cases involved films: *Cobert v. New York*, 388 U.S. 443, 18 L. Ed. 2d 1305, 87 S. Ct. 2092; *Ratner v. California*, 388 U.S. 442, 18 L. Ed. 2d 1304, 87 S. Ct. 2092; *Schackman v. California*, 388 U.S. 454, 18 L. Ed. 2d 1316, 87 S. Ct. 2107; while the others involved books. Justices Brennan and Warren singled out the three cases involving motion pictures, and

voted to affirm the convictions in those cases. Justice Clark voted to affirm the three convictions involving movies, as well as several of the convictions involving books.

Another strong argument that there should be a different test for obscenity in commercially distributed motion pictures is suggested by this Court's opinion in *Redrup v. New York, supra.* The Court indicated that if there is an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, this could be determinative on the obscenity issue.

The constitutional justification for this right of privacy *vis a vis* the First Amendment and a strong argument for recognizing the right in the obscenity context is set forth by Charles Rembar in "The End of Obscenity", *supra,* pp. 500-502. Mr. Rembar's thesis is that the right of privacy is not violated when one reads a salacious novel, but it is violated when one is exposed to obscenity in public places.

The motion picture theater is a public place to which an individual is entitled to go. He has a reasonable right of privacy in a public place. *Cf., Public Utilities Commission v. Pollack,* 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct. 813 (1952), just as he has a more absolute right in private places; *Cf., Breard v. Alexandria,* 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1950); *Stanley v. Georgia,* 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969).

The publication which constitutes the assault upon individual privacy in the motion picture media does not come until the individual is subjected to the actual scene on the movie screen. Before that exact moment, the individual can have no knowledge of the offensive affront to his sensibilities. Grove Press avers in its brief that it has taken "full precautions . . . to advise the public of

the nature of the film (without, of course, engaging in an 'pandering')".[1] They refer to movie theaters as "'controlled' locations which are private in the sense that no unwilling person is required to see the allegedly obscene material." It is a *non sequitur* to say that the public can be advised as to the nature of the intrusion on their privacy without the pandering of the offensive material by the distributor — Grove Press certainly has done nothing to advise a prospective audience that they are about to be exposed to explicit scenes of copulation, fellatio, cunnilingus, sodomy, castration, other than through pandering the sex in the scenario.

The determinative issue, therefore, is whether assault on the individual's privacy which occurs at the moment he sees the stag film sequence on the screen is "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it". Of course, he can shut his eyes, but this does not negate the invasion upon his privacy. He has been subjected to the embarrassment of being exposed in a public place to an indecent performance.

Pursuant to *Redrup v. New York*, *supra*, this invasion of privacy inherent in the presentation of an obscene movie warrants the imposition of less rigorous standards for judging obscenity, e.g., the classic *Roth* test rather than the three-pronged test of *Memoirs*.

The difference between films and writings having been recognized by the Court, and by the publisher in *Memoirs*

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[1] Grove also alleges that it has taken full precautions to exclude minors. The efficacy and very existence of these precautions is challenged by the findings by the District Court of Johnson County, Kansas, in *The State of Kansas v. A Motion Picture Entitled "I Am Curious — Yellow"*, No. 6122, Div. No. 1 (1969), as noted by Judge Barnes in his concurring opinion below.

what sense does it make merely to pay lip service to it? If this Court says movies are different and different standards should apply to them, then different standards should be formulated and applied. The only significant application of book standards to motion pictures occurred in *Jacobellis v. Ohio*, *supra*, but Appellee submits that the sexual content of the film in that case was so innocuous by present day standards that it would not have been found obscene under any standard and that the application to "The Lovers" of criteria applicable to books should not be conclusive as to motion pictures, generally, and "I Am Curious (Yellow)" in particular.

If not the three-pronged test of *Memoirs*, what test should be adopted to effectuate this Court's recognition of a difference between written material and movies? One suggestion with merits is that the *Roth* test without the extensions added to it by some Justices in later cases should be applied to movies. Appellee urges a return to the *Roth* test as to both writings and films, but if not to both, then at least as to motion pictures.

Another viable alternative is to give practical effect to Rembar's recognition of the distinction between expression and conduct.

Pursuant to this theory, a movie is more than speech; it has characteristics of conduct, and it is obscene if its affront to the average person is equivalent to that of obscene sexual conduct. Ever since the *Roth* definition of obscenity was formulated in 1957, commentators have pondered the problem that is now presented by "I Am Curious (Yellow)": whether the *Roth* definition (now the *Memoirs* test) would be an adequate measure of the obscenity of a motion picture film or theatrical play or

television show containing explicit scenes of sexual intercourse and other sex acts.

We submit that although "I Am Curious (Yellow)" is obscene under the *Memoirs* test, even that test does not appropriately measure the film's obscenity. A motion picture film which contains extended scenes of intimate sexual conduct in explicit detail should be judged obscene if it affronts the average person in the same way and to the same extent as does obscene sexual conduct. "I Am Curious (Yellow)" is obscene because it does so affront the average person.

The reasons which justify the illegality of obscene sexual conduct — e.g., conduct such as indecent exposure, public nudity and sexual intercourse in public — support this test of obscenity.

Obscene sexual conduct is illegal because it affronts others. See, for example, the Model Penal Code which penalizes "any lewd act which [the actor] . . . knows is likely to be observed by others who would be affronted or alarmed", discussed in Schwartz, *Morals Offenses and the Model Penal Code*, 63 Colum. L. Rev. 669, 674-675 (1963). "Lewd or indecent behavior is punishable in all jurisdictions. The prohibited conduct amounts to gross flouting of community standards in respect to sexuality or nudity in public."[5] "I Am Curious (Yellow)" similarly amounts to a gross flouting of such community standards, and for that reason, and for that reason alone, can properly be adjudged obscene.

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[5] A.L.I. Model Penal Code, Tentative Draft No. 13, Comments to Sections 213.4 and 251.1, Indecent Exposure and Open Lewdness, p. 82 (1961).

In *Roth* itself, 354 U.S. at 512, Mr. Justice Douglas, dissenting, observed:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct" (Emphasis in original).

In *Kingsley Pictures Corp. v. Regents, supra*, 360 U.S. at 702, Mr. Justice Clark, concurring, stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films or those that 'portray *acts* of sexual immorality, perversion or lewdness'" (Emphasis in original).

In *Trans-Lux Dist. Corp. v. Board of Regents*, 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964), reversed *per curiam* 380 U.S. 259, 13 L. Ed. 2d 959, 85 S. Ct. 952 (1965) citing only *Freedman v. Maryland, supra*,[6] the New York Court of Appeals, in reviewing the film "A Stranger Knocks" which showed two scenes of sexual intercourse, held 4-3 that a different standard is to be employed in judging the obscenity of a movie with such a sexual display.

Judge Burke, writing the majority opinion, distinguished the film from films raising an issue of thematic obscenity, i.e., advocacy of a forbidden theme, such as the films that were at issue in *Commercial Pictures Corp. v. Regents*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) (advocacy

[6] It is fair to infer from the citation of *Freedman v. Maryland* that *Trans-Lux* was reversed because of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity. *See Times Film Corp. v. Chicago*, 390 U.S. 139 (1968), for a similar situation where the Court held a Chicago statute invalid under *Freedman v. Maryland*, noting that it had not considered the issue of obscenity, 390 U.S., n. 1 at 139.

of adultery) and *Joseph Burstyn, Inc. v. Wilson, supra,* (sacrilege).

Judge Burke reviewed the oft-drawn distinction between conduct and speech, and concluded that a film which presented sexual intercourse, real or simulated, was just as subject to regulation as similar conduct "if engaged in on the street".

Judge Burke recognized that there could be no broad theory of legal equivalence between real conduct and a filmed imitation. He then stated:

> "Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film."

Chief Judge Desmond, concurring, put the matter even more strongly.

Another possible test is suggested by the hard core pornography position of Mr. Justice Stewart, and the comment in the *per curiam* opinion in *Redrup v. New York, supra,* that the three-pronged test imposes a "not dissimilar standard". The Court's concern with hard core pornography should be given effect in the realm of films. We are not unmindful of the dictate of *Roth* that material must be considered as a whole, but if a different test is to be applied to movies, this rule may be in need of revision in the film context. The inclusion of one hard core stag film sequence of explicit copulation, cunnilingus, fellatio, etc. should be sufficient to render a film obscene,

If none of these suggested tests is acceptable to the Court, we submit that the Court should draft a new test that would adequately recognize the patent obscenity of "I Am Curious (Yellow)".

VIII.

THERE IS PANDERING OF THE SEX DEPICTED IN THE FILM

This Court in *Ginzburg v. United States, supra*, held that evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. Therefore, when pandering is an issue, material otherwise not obscene may be adjudged obscene because the purveyor has chosen to market the material as being salacious. In the case at issue, evidence of pandering was adduced at the trial court; but inasmuch as there was a finding of Constitutional obscenity, the Court did not have to reach the pandering question. Pandering was argued on appeal (Appellee's Brief, pp. 33-35), but for the same reason, the majority did not reach the issue. Judge Barnes, concurring, did reach the pandering issue and found Appellants culpable on that ground.

Ginzburg can be summed up by the following excerpt from the opinion:

> "This evidence [of advertising] was relevant in determining the ultimate question of 'obscenity' and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publica-

tions to those who are offended by such material and the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality — whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (pp. 470, 471)

Another statement of the Supreme Court in *Ginzburg* which is especially relevant in the context of "I Am Curious (Yellow)":

> "Petitioners' own expert agreed, correctly we think, that '[i]f the object [of the work] is material gain for the creator through an appeal to the sexual curiosity and appetite', the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government, to be an otherwise debatable conclusion." (p. 471)

The pandering of sex in "I Am Curious (Yellow)" is not through the same technique as that utilized by Mr. Ginzburg. Grove Press is a professional purveyor of pornography[7] and they are certainly not going to subject themselves to the *Ginzburg* doctrine by direct advertising of the sex in the movie. The pandering of the sexual as-

[7] See article in August 29, 1969, issue of *Life* Magazine, entitled "The Old Smut Peddler", which characterizes Grove Press' President, Barney Rosset, as a "smut peddler" and describes his commercial exploitation of sex in books and movies.

pects of the movie is, therefore, not quite so apparent, but it is there; and it is quite effective in accomplishing its purpose. It is devious, but striking in its emphasis on the sex.

Appellants argue that under a system of prior restraint, it is impossible to show pandering. Appellee submits that it is difficult, but not impossible, e.g., *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 254 A.2d 203 (1969). The pandering which is present here is in the scenario (Respondent's Exhibit No. 9) which is sold in conjunction with the movie. With prior censorship the movie has not yet been shown in Maryland. We are therefore precluded from proving that the book is sold in the lobby of the theater and newsstands are saturated with it while the movie is in town as is the case in other jurisdictions.[8] There is evidence, however, that supports the conclusion that the book is sold in conjunction with the movie, to promote the movie, and this is all that is necessary under *Ginzburg, supra*.

The pandering of the sexual aspects of the movie in the scenario is patent. The undue emphasis in the scenario on the sexual aspects of the movie is to pander the sex in the movie. The scenario, in emphasizing the sex in the movie, reveals its object as "material gain for the creator through an appeal to the sexual curiosity and appetite." *Ginzburg, supra*.

The book itself, and Appellants' own witness, Dr. Mackie, clearly prove the pandering of the sex in the movie by

[8] e.g. finding of Judge Herbert W. Walton in the case involving this movie in the District Court of Johnson County Kansas, No. 6122, Div. No. 1: "Copies of said paperback were offered for sale and were sold to the public in the lobby of the Kimo South Theater during the exhibition of the film".

virtue of the publication and dissemination of the scenario to promote the movie and arouse the curiosity as to its sexual content. Dr. Mackie had read the scenario — his testimony was that there was a larger proportion of photographs of the sexual scenes in the book than in the movie, and that someone looking at this book would be struck by the disproportion (J.A. 305-309). He also stated that the use of the series of stop action frames depicting the sexual scenes served to emphasize the sexual theme (J.A. 314). This is quite relevant, and determinative in and of itself, in the context of the cited *Ginzburg* holding that animation of sensual detail to give the publication a salacious cast constitutes an appeal to the sexual curiosity and appetite and mounts up to the proscribed pandering.

The Court has the book as an exhibit and its speaks for itself in its concentration on the sexual aspects of the movie. Some guidance is provided by the comments of the Attorney General (J.A. 306):

> "You have a book on the cover says 250 illustrations. If you count the illustrations in this book, you will find approximately 100 of the 250 have to do with sexual themes, out of the 250. That is 100 out of 250, which is forty percent of the total against six minutes of 120 minutes or 135 minutes of the film, and if you will look you will find that in a period of some — pages 89 to about 160, you have some 83 or 80 sexual pictures against 60 others, which is about a hundred and twenty-five percent, which indicates there is a very significance emphasis on the pornography we say is in the film in this book, . . ."

This pandering of the sex in the movie is generated solely by the profit motive. By concentrating on the sex in the book, Grove Press sells the book; and by selling the book, they sell the sex in the movie.

IX.

THE MARYLAND FILM LICENSING STATUTE IS CONSTITUTIONAL.

Appellants have attacked the Maryland censorship statute on five grounds. We will first proceed to discuss grounds A and E together. Appellants say:

> "A. The Maryland Statute Operates to Prevent the Exhibition of Films in Instances Where Such Exhibition Would be Constitutionally Protected."
>
> "E. The Licensing Requirement Is Absolute and Does Not Permit Even Nonobscene Films To Escape Prior Review."

The imposition of the blanket prior restraint over both obscene and non-obscene films inherent in the concept of prior censorship was held by this Court to be a valid exercise of state sovereignty in *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L. Ed. 2d 403, 81 S. Ct. 391 (1961). This holding was made more specific by this Court in *Freedman v. Maryland, supra*, wherein the Court noted as a specific holding that "the state may require advance submission of all films in order to proceed effectively to bar all showings of unprotected films . . .". Under the Maryland system of prior censorship, only obscene pictures are refused a license,[9] and this procedure is subject to the required judicial review. Films which are found to be non-obscene are granted a license with minimal delay. This Court's holding in *Stanley v. Georgia, supra*, does not affect the Board's jurisdiction in reviewing films for commercial distribution.

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[9] Amicus Curiae Brief of Motion Picture Associates of America, Inc. have incorrectly recited the history of litigation pursuant to the statute. Footnote 27 should be amended to reflect Censor Board victories in *Heacitt v. Maryland Board of Censors*, 254 Md. 179, 254 A. 2d 203 (1969) and *Heacitt v. Maryland Board of Censors*, 255 Md. 528, 258 A. 2d 217 (1969).

The argument that the Board's licensing discretion under the statute is overly broad has been considered by the Maryland Court of Appeals in *Sanza v. Maryland State Board of Censors*, 235 Md. 319, 226 A. 2d.317 (1967). We adopt its holding as our argument as to this contention (at 339-341):

> "The appellants contend also that the Act is unconstitutional in respect of its coverage; that an overly broad discretion is delegated to the Board as to the films which may be censored, in violation of the due process clause of the Fourteenth Amendment; . . . We find [this contention] to be without merit.
>
> "The argument that the Board's licensing discretion under the Act is overly broad rests on the assumption that the Act applies to films and views shown for non-commercial as well as commercial purposes. On this assumption, the appellants contend that a person exhibiting a home moving picture or a store selling a scenic slide would be required under the Act to submit the film or view to the Board for approval and licensing. However, we believe the assumption to be erroneous. While the definitions of 'film' and 'view' in Section 1 of the Act are not expressly restricted to films and views to be shown commercially for profit, such an interpretation, in our opinion, is the only one consistent with the legislative intent as expressed and implied in the Act as a whole.
>
> "For the constitutional reasons previously considered, a legislative enactment providing a system of pre-showing censorship, like a penal statute, is to be strictly construed. The definitions of the words 'film' and 'view' in Section 1 state that the words shall be construed to include what is 'usually' meant by the respective terms. This language of the Act, in our opinion, calls for construction, and when there is occasion for construction, the Court, in determining legislative intent, will consider not only the literal meaning of the words 'but their meaning and effect considered in the light of the setting, the objectives and pur-

poses of the enactment, and the consequences that may result from one meaning rather than another . . . with the real legislative intent prevailing over literal intent.' *Height v. State*, 225 Md. 251, 257, 170 A. 2d 212 (1961). '[T]he construction should be in harmony with the manifest intent of the act and should not lead to an absurdity.' *Gatewood v. State*, 244 Md. 609, 224 A. 2d 677, 682 (1966), and cases therein cited.

"Under a literal construction, the Act would mean, as the appellants argue it does mean, that a Baltimore department store could not sell a slide of the Washington Monument without first submitting the view to the Board for approval. The illustration itself is a *reductio ad absurdum* of the argument that the Act should be given the sweeping construction which alone could bring about such a result. Section 7 requires a certificate to be shown on each approved film that it has been 'Approved by the Maryland State Board of Censors'. We do not believe the Maryland Legislature could ever have intended that a *pater familias* could not show in his home a moving picture which he has taken of his children without first obtaining the Board's approval and then affixing the certificate to the film. Yet, literally construed, the Act would require such a procedure.

"In support of their contention that the Act must be given a broad interpretation as to its coverage, the appellants cite the language of Section 23. That Section reads in part as follows:

> 'This article shall not apply to any non-commercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning.'

The appellants argue that the Section does not exempt all noncommercial exhibitions of films or views, and that, therefore, all films and views not included in the exemption are covered. In our opinion, how-

ever, the exemption may well be taken to have been enacted so as to preclude the application of the Act to the showing of films or views for money if the money is collected by the designated non-profit organizations. So construed, the exemption is consistent with an interpretation of the Act which limits its application to films and views to be shown for an admission charge, except when shown by public associations or institutions which do not operate for profit.

"At the hearing below, a member of the Board testified that the Board has never applied the Act, to her knowledge, except in accordance with this interpretation. Consistent, long-continued, unvarying administrative construction of a statute will be given great weight. *State Roads Comm'n v. Jones*, 241 Md. 246, 256, 216 A. 2d 563 (1966), and cases therein cited. In this case, we find that the administrative construction has been in accord with the legislative intent."

Appellants also contend that:

"B. The Obscenity Standard of the Maryland Statute Is Patently Unconstitutional."

Appellants' second objection to the statute is that the obscenity standard of the Maryland statute is unconstitutional. The short answer to this is that the Maryland Court of Appeals has already held in *Sanza, supra*, that the Section 6 definition of obscenity is unconstitutional. The statute does contain a severability clause and the Court, in holding the definition of obscenity of Section 6 to be unconstitutional, held that the only standard of Section 6 which remains is that the Board shall disapprove such films "as are obscene". The Court recognized that the only proper standard for disapproval of a film was obscenity in a constitutional sense under the rules laid down by this Court. The only remaining standard of Section 6 after February 8, 1967 (the date of the Court of Appeals'

decision in *Sanza*), is the portion of Section 6 which states that the Board shall disapprove such films "as are obscene". This Court in *Roth* upheld federal and state statutes stated in such broad definitional terms. The statute as it now stands recognizes only obscenity as defined by this Court as grounds for the refusal to issue a license; the Board of Censors, in every case, applies only this Court's criteria in making its judgments, and it did so in the instant case; the proof at trial in review of its administrative determination is presented in accordance with these criteria, and was so presented in the instant case; the trial court applies these criteria, and the Court of Appeals of Maryland recognizes this Court's definition of obscenity as the only controlling criteria.

Appellants' reliance on *Aptheker v. Secretary of State*, 378 U.S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964) and *Zwickler v. Koota*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967) is misguided as these cases are readily distinguishable. After February 8, 1967, pursuant to the dictate of the Maryland Court of Appeals, the only standard which the Censor Board could employ is obscenity in a constitutional sense as defined by this Court. Appellants in attacking the definitional standard of Section 6(b) are attacking a standard which is no longer part of the Maryland law, having been found to be unconstitutional by the Court of Appeals. In both cases cited by Appellant, a subsisting, overly broad definitional standard in a statute was at issue and the Court said that it would not judicially rewrite the statute so as to give validity to the standards as applied to the facts then at issue. Section 6 of the Maryland statute was concededly overbroad prior to *Sanza, supra*. Sanza preceded the litigation in this case, and thus Sec. 6 was not overbroad when the Board of Censors rejected "I Am Curious (Yellow)."

The proper rule is stated by this Court in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). There, Mr. Justice Stewart, delivering the opinion of the Court, noted that the Supreme Court of Alabama "performed a remarkable job of plastic surgery" on the Birmingham ordinance providing for administrative issuance of permits which was unconstitutional on its face for overbreath. He characterized this as "a commendable effort to give the legislation 'a field of operation within constitutional limits'." For purposes of prospective application of the ordinance, the Court held, "we may assume that this exercise was successful and that the ordinance as now authoritatively construed would pass constitutional muster". A caveat to this assumption was appended in a footnote to the effect that it would depend, among other things, on the availability of expeditious judicial review of the administrative refusal to issue a permit, a point which was reinforced in Mr. Justice Harlan's concurring opinion.

Applying the holding of *Shuttlesworth, supra*, to the instant case, we have the judicial surgery to Sec. 6 of the statute by the Court in *Sanza, supra*, so that from and after February 8, 1967, it passes constitutional muster. The caveat is satisfied by the provisions of Section 19 assuring prompt judicial review. The definitional standard of the statute is clearly constitutional under the holding in *Shuttlesworth*.

The Court noted in *Shuttlesworth* that the test to be applied, if a narrow construction is to be given retroactive effect, is whether the statute has been administered in "the fair and nondiscriminatory manner which the state court has construed it to require". This test would be easily satisfied by the Censor Board as they have consist-

ently employed the test for obscenity laid down by this Court, and no other test.

The next attack by Appellants is that:

"C. The Maryland Statute Tolerates Long Delays Before Final Judicial Decision."

This is not the first time this Court has been asked to consider the Maryland statute as to the third point raised by Appellant. In *Freedman v. Maryland, supra* (decided March 1, 1965), this Court found the statute to be unconstitutional as a violation of the First Amendment to the Constitution because: if the Board disapproved the film, the exhibitor was required to assume the burden of instituting judicial proceedings and of persuading the court that the film was constitutionally protected expression; 2) after the Board had declined to license the film, its exhibition was prohibited pending judicial review, however long such judicial review might take; and, 3) the Maryland statute provided no assurance of prompt judicial determination.

By Chapter 598 of the Acts of 1965, enacted as an emergency measure, effective April 8, 1965, the General Assembly of Maryland repealed and re-enacted Section 19 of Article 66A, with the obvious intention of fully meeting the three objections set forth in the *Freedman* opinion. The new Section 19 provides that any film duly submitted to the Board for examination and licensing "shall be reviewed and approved within five (5) days, unless the Board shall disapprove" the film under the provisions of Section 6. In the event of disapproval, the Board is required "within not later than three (3) days thereafter, to apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene. . . ." It is also required that "notice of such appli-

cation shall be forthwith sent by first class mail, postage prepaid, to the address of the person presenting such film for licensing". The Circuit Court is required within five days after the filing of the application to conduct a hearing, view the film, and within two days after the hearing, "enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said Section 6 hereof." It is further provided that if the order disapproves the film, then the person presenting the film for licensing may appeal such determination to the Court of Appeals in accordance with the Maryland Rules of Procedure, and the Court of Appeals "shall advance such case upon its hearing calendar to the earliest practicable date" and in its review, the Court of Appeals "shall view the subject film". Then is added, "The burden of proving that the film should not be approved and licensed shall rest on the Board."

In *Trans-Lux v. Maryland Censor Board*, 240 Md. 98, 213 A. 2d 235 (1965), the Court of Appeals of Maryland held that the amendment fully satisfied the constitutional requirements of *Freedman*.

Appellants' argument is that the amendment does not set a time limit within which the Court of Appeals must act, and that the statute is therefore unconstitutional as not meeting the *Freedman* requirement of assuring a "prompt final" judicial decision. Appellant argues that the terminology, "final judicial decision", means the decision of an appellate tribunal. This is clearly not the meaning of the Court in *Freedman*.[10] Final judicial decision in this context means a final determination by a trial court on the merits, reviewing an administrative refusal to li-

[10] This was pointed out by Mr. Justice White in colloquy with counsel during the recent argument in the case of *Byrne v. Karalexis*, *supra*.

cense. The word "final" in this context is used to distinguish an adjudication on the merits after an adversary proceeding from a preliminary injunction. The Court made this clear in *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L. Ed. 2d 966, 88 S. Ct. 754 (1968) in holding that the Chicago censorship ordinance was violative of the *Freedman* standard because "The absence of any provision for a prompt judicial decision by the trial court violates the standard that '. . . the procedure must also assure a prompt final judicial decision". Statutory assurance of prompt judicial decision by the trial court in reviewing the action of the administrative censor is the requirement imposed by *Freedman* and applied in *Teitel*.[11] Appellants here do not contest the statute at issue on these grounds, but rather they would create an additional requirement imposing time limitations on appellate action. Even though no such requirement has been enunciated by this Court, the Maryland statute goes a long way toward implementing such a procedure. It provides that censorship appeals shall be advanced on the calendar of the Court. In the instant case the appeal was advanced on the appellate calendar, and came on for hearing in the shortest possible time compatible with the preparation of the record and briefs. The lengthy opinions of the majority, concurrence and dissent, account for the complained of delay in the issuance of the Court's opinion.

A short review of the history of this case should be made to counter any allusions Appellants make as to State-caused delay. The Censors' determination, the filing of suit and the start of the trial were all within statutory

[11] See Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 518 (1970), in accord, for a more detailed discussion of what is meant by the *Freedman* requirement; see also Mr. Justice Harlan's concurring opinion in *Shuttlesworth, supra*, re permissible delays in movie censorship proceedings.

time limits. The trial lasted two weeks — largely on account of lengthy cross-examination by Appellants of Appellee's witnesses and because of the numerous witnesses produced by Appellants. The trial court's opinion was filed within two days from the conclusion of the trial on July 31, 1968, in accordance with the statute. The lengthy record was not completely transcribed until mid-way through August. Briefs were then submitted prior to appellate argument on September 8 (the first day of the September Term of the Court of Appeals after the summer recess). The case was advanced on the calendar of the Court of Appeals to be heard on that day. There was no request by Appellant for an immediate decision of the Court on the obscenity issue to be followed by an opinion at a later date as had been rendered by the Court in prior obscenity cases, e.g., *Trans-Lux v. Maryland Censor Board, supra*. The Court's lengthy decision was filed on October 22, 1969.

The next point urged by Appellants is that:

"D. The Statute Lacks Procedural Safeguards."

This Court has made clear in *Shuttlesworth, supra*, and *Freedman, supra*, that such a statute is valid if it can pass constitutional muster on two points: (1) if it sets forth proper criteria for the issuance of the license and (2) if there are proper procedural safeguards built into the statute. The Court made it clear in *Freedman* that the procedural safeguards to which it was making reference in this context were the presence of statutory assurance of prompt judicial review of the administrative refusal to license, with the administrative agency having the burden of proof to sustain its action. The Maryland statute does pass muster on these two points and it is therefore not subject to attack on the grounds pressed by Appellants.

The holding of the United States District Court in *Universal Film Exchanges, Inc. v. Chicago*, 288 F. Supp. 286 (N.D. Ill., 1968), dealing with a Chicago censorship statute very similar to our own, is dispositive of Appellants' contention in this respect. There, too, the appellants were attacking the administrative procedure employed by the censor. The Court's holding was:

> "It is the opinion of this Court that findings of an administrative censor are not a constitutional requirement. Since *Freedman . . . [supra]*, it has been clear that only a *de novo* judicial determination that a motion picture is unprotected by the First Amendment can justify a valid final restraint of a motion picture in advance of exhibition. The judiciary is perfectly capable of making its own determination of whether or not a film falls within the proscribed bounds, especially where the statute simply regulates 'obscene' films. A requirement of administrative findings, whether of fact or law, would merely slow down the pre-judicial proceedings, without contributing anything useful to the Court. The role of the preliminary censor under *Freedman v. State of Maryland, supra*, is not to be viewed as the role of a special master or fact finder; rather, the role of the administrative censor is merely to winnow out the harmless motion pictures so that pendente lite restraint on their dissemination may be as short as possible." (p. 293)

Appellants' argument in this respect makes no practical sense. The proceedings before the Board are not of an adversary nature, and they are not contemplated to be so by statute. The Board views the film and seeks expert advice in making its determination as to whether a movie is obscene. If it finds the film to be obscene, the Board must take it to court and carry the burden of proof to support its finding. What was contemplated in *Freedman* has been rigidly adhered to. How the Board made its decision is not

an issue; whether it can prove it was correct is the determinative question. This type of censorship without an adversary proceeding at the administrative level was found to be valid by the Supreme Court in *Times Film Corp. v. Chicago, supra,* and *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957).

X.

THE STATE OF MARYLAND IS NOT BOUND BY A FEDERAL CIRCUIT COURT'S OPINION ON THE OBSCENITY ISSUE

Appellants, in support of their novel constitutional proposition in derogation of our federal form of government, have advanced an ethereal argument to the effect that "breathing space" for free speech requires that the states be enjoined from taking any action against material which has been found to be non-obscene in a federal customs case.

They start with the untenable premise that the United States government is proscribed by virtue of the 2nd Circuit decision from any further judicial action against the film. They then argue that this Court has made repeated reference in various contexts to the importance of leaving "breathing space" for the exercise of the constitutionally protected rights of free speech. In each of the cases they cite, a State law was held to be unconstitutional because it could be improperly applied to affect the exercise of First Amendment rights. The "breathing space" reference in these cases is to the principle that statutes in derogation of the right of free speech must not be vague, as the threat of sanctions under a vague statute can act to inhibit the exercise of the right. This rule is stated by the Court in *NAACP v. Button,* 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963): "Because First Amendment freedoms need breathing space to survive, government may

regulate in the area only with narrow specificity". In the area of obscenity, however, the Court has allowed broader statutory definitions of proscribed material, as further defined by the proper standard for judging obscenity enunciated by the Court. *Roth, supra.*

The right of free speech is not an absolute right, but any legislative attempts to limit it must be narrowly directed to proscribe only conduct or materials which are clearly encompassed by the recognized exceptions to the right. Obscenity is clearly one of these exceptions. *Roth supra.*

As noted above, the "breathing space" requirement is satisfied here by the constitutionally acceptable definition of obscenity in the Maryland statute. The requirement is clearly not applicable to contravene the federal principle of our Constitutional government which recognizes that control of obscene materials is a legitimate field for the exercise of State sovereignty.

Appellants, after misapplying the "breathing space" requirement, attempt to attack the central issue, i.e., is the state foreclosed, because of the action taken in the federal court, from exercising an important element of its sovereignty — the protection of its populace from obscene materials.

The transparency of Appellants' argument in this respect is readily discerned by virtue of their misconstruction of the cited cases. The principle they are attempting to support by cited case law is that a federal judicial holding forecloses future state judicial resolution of the same issue. The first case they cite in support is *Rea v. United States,* 350 U.S. 214, 100 L. Ed. 233, 76 S. Ct. 292 (1966). They argue that this case makes a federal court's determination

of the admissibility of evidence objected to on the grounds of illegal search and seizure *res judicata* as to this issue in a subsequent state prosecution. This is exactly what the Court did not hold. The facts there were that in a federal prosecution for unlawful acquisition of marijuana, the evidence was suppressed by the federal district court and the indictment based on that evidence was dismissed. Thereafter, the petitioner was charged with possession of marijuana in violation of New Mexico law. While awaiting trial in the state court, he filed a motion in the district court to enjoin the federal agent from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search. This Court, in holding that injunctive relief should be granted, noted that the case did not involve a constitutional question, but only one concerning the court's supervisory powers over federal law enforcement agencies. They did not hold that the state court is bound by the federal court finding of inadmissibility — they held only that the federal officer could be enjoined from testifying in the state proceeding. In *Cleary v. Bolger*, 371 U.S. 392, 9 L. Ed. 2d 390, 83 S. Ct. 385 (1963), also cited by Appellants, this Court explicitly ruled that the holding in *Rea, supra*, would not justify an injunction preventing a state officer who participated in a search and seizure with a federal officer from testifying in a state proceeding even if such an injunction would be warranted against the federal officer pursuant to *Rea*. The Court noted:

> "The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, *cf., e.g., Mapp v. Ohio*, 367 U.S. 643 . . ., he may raise the objection in the state courts and then seek review in

this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

Accordingly, the cases cited by Appellants in the search and seizure field contravene the proposition for which they are cited. They hold that state courts are not bound by federal court holdings — if there is error in the state court proceedings, it can be corrected by the Supreme Court.

The cases in the second category cited by Appellant, *Adams v. Maryland*, 347 U.S. 179, 98 L. Ed. 608, 74 S. Ct. 442 (1954) and *Murphy v. Waterfront Commission*, 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) stand merely for the principle that immunity granted by either the state or federal government must govern the other jurisdiction in order to effectively preserve the First Amendment right. These cases are not germane to the principle they are cited to support.

Appellants' bland assertion that *Bartkus v. Illinois*, 359 U.S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959) has been impliedly overruled by *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) is just not correct.[12] The holding in *Bartkus* is based primarily on the concept of federalism and *Benton* does nothing to change this. The only effect of *Benton* was to make the double jeopardy provision of the First Amendment effective against the

[12] The Court of Special Appeals of Maryland in *Melville, et al. v. Maryland*, No. 328, September Term, 1969, decided August 5, 1970, held: "Appellants rely on *Benton v. Maryland*, *supra* and *Murphy v. Waterfront Commission*, 378 U.S. 52 to refute the present effectiveness of *Bartkus*. We find nothing in *Benton* or *Murphy* to indicate that the precise holding in *Bartkus* is no longer effective.

states. Pursuant to it, a State prosecution would be barred only if there has been a prior acquittal in the State courts; a prior federal acquittal would not bar state prosecution.

That is the substance of Appellants' attack on the principle of federalism applied to the facts. They make their attack in a roundabout way, not alleging directly, as they did in the Maryland Court of Appeals, that this is an area where the federal government has preempted State action. Preemption is what they must allege and show before they can prevail on an argument that would contravene the federalism principles. They have abandoned the argument as untenable and have substituted one which would have the same effect — to preempt the states from exercising an important aspect of their police power. They cite no authority which would justify this Court in departing from established concepts of federalism.

Appellants' contention that the State of Maryland is bound by the 2nd Circuit's decision is further refuted through an analysis of that proceeding. The government produced no expert witnesses as we did; the evidence of pandering in the case at bar was not present in the federal case; and the issue was determined by application of a standard adhered to by only a minority of this Court, and which Appellee claims is an improper standard for judging the obscenity issue in general, and in particular, the obscenity of a motion picture. There is the additional unresolved problem as to whether local or national standards are to be the measure — the federal case could not and did not consider Maryland standards in arriving at its decision. This is not an issue in the instant case as even the majority in the 2nd Circuit found the film to be patently offensive; it is an issue, however, which could be present in cases such as this, and this would preclude the adoption of the general rule proposed by Appellants.

This contention could readily have been answered in this brief in the summary fashion in which it was treated by the Court of Appeals below. We adopt its reasoning as further argument on this point:

> "Finally, the Appellants argue that the judgment of the United States Court of Appeals for the 2nd Circuit in *I Am Curious (Yellow)*, *supra*, is conclusive on the State's case in that the federal statute under which adjudication was made must be read as preempting the right of a state later to subject the film to further restraint in advance of public showing. The short answer to this is that the Supreme Court in *Freedman*, *supra*, recognized that as long as a state follows the procedural safeguards suggested therein, it may validly exercise its police power to effectuate a censorship system. It is our belief that only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us. Constitution of Maryland, Declaration of Rights, Article 2."

XI.

THIS COURT'S HOLDING IN *STANLEY v. GEORGIA* DOES NOT FORECLOSE THE STATES FROM PROHIBITING THE COMMERCIAL DISSEMINATION OF OBSCENE MATERIALS.

The Appellants say it does. A similar contention has been raised in *Byrne v. Karalexis*, No. 1149, October Term, 1969, scheduled for re-argument before the Supreme Court during the 1970 October Term. The point has been extensively briefed by the State of Massachusetts in that proceeding, and we adopt its in depth argument as briefed.

This Court's holding in *Stanley v. Georgia*, *supra*, was a limited one: "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene materials a crime. *Roth* and the cases following that decision are not impaired by today's holding." This Court also indicated that "*Roth* and the cases following it

discerned such an important interest in the regulation of commercial distribution of obscene materials" as would justify continued legislative suppression of commercial distribution as opposed to private possession.

Appellee agrees with Appellants' construction of *Stanley* to the effect that it would allow an individual to possess a print of "I Am Curious (Yellow)" in his own home. That is the extent of the *Stanley* holding. The Court did not indicate that an individual could show an obscene film in his living room and charge admission. The Court did not indicate that the distributor who sold the print would be protected from prosecution. The Court certainly did not hold that the obscene movie should be granted protection from state laws when shown in a motion picture theater.

This last extension is one Appellants would have this Court engraft on the *Stanley* rule in this proceeding. The Massachusetts' Brief hereinbefore referred to makes it clear that such an extension is unwarranted.

Appellants proceed from the factual hypothesis that "a film may be exhibited at a theater in a manner that assures no intrusion on sensibilites of unwilling members of the public and no admittance of children", and they apply that hypothesis to the film at issue. Their argument must fall on the facts, before even reaching the law, because the hypothesis cannot be assumed — the facts are not as Appellants would have them. In the first place, what is there that Grove Press has done to apprise the public of the perverse display of sex in the film, other than the pandering scenario? How has the citizen been apprised of the existence of the explicit scenes of fellatio, cunnilingus and copulation? Appellants' allegedly non-pandering newspaper advertisements do not advise the public of these matters, and Appellee submits that unless

an individual is fully informed prior to seeing the movie as to what he is to be subjected to, he is not protected from an unwanted invasion of his privacy. Since such appraisal could not be accomplished without pandering, it is inherently impossible to notify the public in order to protect unwilling people from exposure. The patent inconsistency of Appellants' first factual hypothesis renders it unworthy of consideration. The second factual hypothesis is just not recognized in practice — the money-grabbing "sexploitation" exhibitors do not turn customers away, as was specifically pointed out by Judge Barnes in his concurring opinion. The assumed facts are not borne out in practice, and offer no basis for the ensuing legal argument.

As to the legal argument, the Massachusetts' Brief deals fully with the propriety of state legislation in the obscenity field. It does not deal specifically with Appellants' argument that *Redrup* and *Ginzburg, supra*, establish a limited area of legitimate governmental interests. All that *Ginzburg* held was that pandering could be determinative on the obscenity issue even if the material was not obscene *vel non*. The Court noted that the obscenity *vel non* issue need not be reached when there is pandering. In *Redrup*, the Court continuing in this vein noted that the obscenity *vel non* issue under any of the recognized tests need also not be reached if (1) the material is being considered pursuant to a statute reflecting a specific and limited state concern for juveniles, or, (2) the material is being considered under a statute dealing with intrusion on privacy. The Court did not hold that a State statute must reflect a limited concern for juveniles, or that it focus on any intrusion of privacy, or that it must require pandering. The holding was that absent these considerations, the Justices would apply their respective tests for obscenity *vel non* to the materials in the context of the

state laws generally forbidding dissemination of obscenity. The Court has followed such a course in numerous cases subsequent to *Redrup* in which *Redrup* has been cited as the only authority. *Stanley* has not changed the state of the law in this respect. Statutes generally proscribing publication and sale of obscene materials such as were held valid in *Roth* and which were recognized as having continuing validity in *Redrup* are not affected by *Stanley*. Statutes which proscribe private possession of obscene materials are the only laws in this area affected. Commercial dissemination of obscenity is the issue here; the states clearly have the power to legislate in this area.

XII.

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS.

The facts underlying this contention should be brought to the Court's attention in order that it may be considered in the proper context. The film was submitted for review to the Censor Board in compliance with Article 66A. Pursuant to Section 19, they had five days in which to consider the film. They sought expert advice as to the obscenity of the film from various sources. Upon their failure to license the film, litigation pursuant to Section 19 was in order and the matter was referred to counsel for the Board, the Attorney General of Maryland. Additional expert witnesses viewed the film at the behest of the Attorney General's office in preparing for trial. Counsel then selected which expert witnesses were to testify as to each of the *Memoirs* tests. Other expert witnesses who viewed the film at the State's request were not called for a number of reasons — either their testimony would be cumulative, or their testimony would not in all respects be helpful, or they would be unavailable to testify. An adversary civil trial followed in which the State produced four expert witnesses in furtherance of its case and Appellants

produced eight such witnesses. The exact identity of Appellants' witnesses was never made known to the State prior to their being called — this despite the State having forewarned Appellants verbally before the trial began as to the identity of the witnesses whom it would produce.

Appellants would have this Court extend the criminal due process rule of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) to this adversary civil proceeding in order to reach the work product of the Attorney General accumulated in the preparation of the case. They cite no authority for this proposition; accordingly, it must be rejected.

They then go on to the argument that even if the principle is limited to criminal cases, it should apply here. They allege that the Board's failure to license is equivalent to seizure of the print — this is not correct. If the Board's failure to license is either sustained or overruled in the courts, the print is returned with the outcome of the litigation being determinative of whether it may be exhibited in the State. The procedure is not in any way anomalous to that recognized in *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965) wherein it was recognized that a proceeding for the forfeiture of property used in violating a criminal law is quasi-criminal in character. Appellants' attempt to equate a civil adversary obscenity trial into a quasi-criminal proceeding must, therefore, fail.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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THOMAS N. BIDDISON, JR.,
Assistant Attorney General
of Maryland,

For Appellee.

GROVE PRESS, INC., ET AL. *v.* MARYLAND STATE BOARD OF CENSORS

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

No. 63. Argued November 10, 1970—Decided March 8, 1971

255 Md. 297, 258 A. 2d 240, affirmed by an equally divided Court.

Edward de Grazia argued the cause for appellants. With him on the brief were *Nathan Lewin, Arnold M. Weiner,* and *Alan M. Dershowitz.*

Francis B. Burch, Attorney General of Maryland, argued the cause for appellee. With him on the brief was *Thomas N. Biddison, Jr.,* Assistant Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Felix J. Bilgrey* for the International Film Importers & Distributors of America, Inc.; by *Louis Nizer* for the Motion Picture Association of America, Inc.; by *Leon Friedman* and *Lester Pollack* for the National Association of Theater Owners, Inc., and by *Stanley Fleishman* and *Sam Rosenwein* for the Adult Film Association of America, Inc.

Francis J. Rudolph filed a brief for Morality in Media, Inc., as *amicus curiae,* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.